Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1988

THE CITY OF WHITTIER, a Charter City,

Petitioner,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURKE, WILLIAMS & SORENSEN

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QUESTIONS PRESENTED

1. Does the City of Whittier's adult business zoning ordinance, which permits adult businesses to locate in 13.4% of the area zoned for commercial uses in the City, leave open reasonable alternative avenues of communication under this Court's opinion in *City of Renton v. Playtime Theatres, Inc.*?

2. Is a party entitled to attorney fees under 42 U.S.C. § 1988 and interest under 28 U.S.C. § 1961 for work done on separate and distinct portions of a case which were vacated and for which no detailed time records were submitted?

LIST OF PARTIES

The parties to the proceedings below, which comprised four cases consolidated for disposition, were the petitioner City of Whittier and the respondent Walnut Properties, Inc.

Also named as parties in the cases below were the Whittier City Council; M. D. Klaxton, R. L. Henderson, L. A. Strong, Gene Chandler and V. A. Lopez as members of the Whittier City Council (Messrs. Henderson and Strong are no longer on the Council); James Bale, as Chief of Police, City of Whittier; J. Robert Flandrick, as City Attorney, City of Whittier; Elvin Porter as City Planner, City of Whittier; and Vincent Miranda, an individual, now deceased, who was president of respondent Walnut Properties, Inc.

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WALNUT PROPERTIES, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, City of Whittier, respectfully prays that a writ of certiorari issue to review those portions of the decision of the Ninth Circuit Court of Appeals, filed November 9, 1988, holding that the City's adult business zoning ordinance violates respondent Walnut Properties, Inc.'s right of free speech guaranteed by the First Amendment to the Constitution of the United States because it fails to leave open reasonable alternative avenues of communication and awarding respondent Walnut attorney fees under 42 U.S.C. § 1988 for all work done in the District Court, the Ninth Circuit, and

in this Court, with interest from the dates of the initial awards, even though the judgment of the District Court and the decision of the Ninth Circuit were vacated.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals appears as Appendix A and is reported at 861 F.2d 1102 (9th Cir. 1988).

Other published and unpublished decisions of the Ninth Circuit Court of Appeals, unpublished decisions of the District Court, and the Order of this Court summarily vacating a prior Ninth Circuit decision in this case appear as Appendices B through N.

JURISDICTION

Respondent Walnut Properties, Inc. ("Walnut") sought injunctive and declaratory relief under 42 U.S.C. § 1983 against enforcement of Petitioner City of Whittier's ("City") adult business ordinance which was modeled after the ordinance approved by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) ("Walnut I"). In a separate action, Walnut sought further injunctive and declaratory relief and damages against the City, the City Planning Director and the City Attorney under 42 U.S.C. § 1983 ("Walnut II"). Walnut sought attorney fees under 42 U.S.C. § 1988 in both actions.

Federal jurisdiction was based on 28 U.S.C. § 1343 subdivisions (3) and (4).

The jurisdiction of the Supreme Court to review the judgment is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides

> Congress shall make no law . . . abridging the freedom of speech . . . .

The full texts of Whittier's Ordinance Nos. 2327, 2257, 2254, 2138, 2121 and 2116 appear as Appendices O through T.

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals, purporting to follow this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), held the City's adult business ordinance to be unconstitutional on the basis that it denies Walnut a reasonable opportunity to open and operate an adult business in the City and would force the closure of all adult businesses existing at the time the Ordinance was adopted.

Whittier, like the City of Renton, is a small city (70,000 residents) located immediately adjacent to a large metropolitan area (Los Angeles). By 1977, Whittier had experienced a rapid growth of adult businesses. Whittier adopted an urgency ordinance to maintain the status quo so that the problems associated with adult businesses could be studied. (No. 2116, App. T.) During a seven month study, several public hearings were held, surveys made, and the experiences of many other similarly situated cities and counties, including Los Angeles County, were examined. Whittier's studies showed, among other things, depreciation in property values and an increase in crime in the areas in which adult businesses were located, including prostitution, assault and battery,

theft, arson, sexual offenses, and an influx of drunk drivers' and intoxicated pedestrians.

In February 1978, Whittier adopted a zoning ordinance (No. 2138, App. R) based on *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, which permitted defined adult businesses in commercial and industrial zones, with separation requirements of 500 feet from residences and 1,000 feet from schools, churches, parks or other public facilities utilized by minors, and other adult businesses. The ordinance grandfathered in existing adult businesses which were in violation of the ordinance as legal non-conforming uses subject to abatement after an amortization period, in a manner approved by the California courts in *National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 878, 83 Cal. Rptr. 577, 464 P.2d 33 (1970); *Castner v. City of Oakland*, 129 Cal.App.3d 94, 96, 180 Cal. Rptr. 682 (1982) and *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 644, 197 Cal. Rptr. 127 (1983).

Walnut owns and operates a chain of several dozen adult movie theaters known as the Pussycat Theaters. The Pussycat Theater in Whittier is located in the "Uptown" area, one of two major commercial centers in the City, within 1,000 feet of four churches, two of which operate full-time parochial elementary schools.

After expiration of the amortization period applicable to the Pussycat Theater, the City, after duly noticed public hearings attended by Walnut's counsel, issued an order of abatement requiring relocation of the theater. Walnut refused to comply with the order of abatement, and the City filed an action in the Los Angeles County Superior Court to enforce the order by injunction. The state court litigation resulted in an opinion by the

California Court of Appeal (*City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633) validating the ordinance, which was amended during the course of the litigation. Ordinance No. 2254, an urgency ordinance, and Ordinance No. 2257, the permanent version, deleted from the ordinance the requirement that an adult business be at least 1,000 feet from any public facility utilized by minors. App. Q and P.

During the pendency of the state court litigation, Walnut filed a lawsuit in the District Court of California, Central District, on May 7, 1981, alleging the ordinance was unconstitutional. After trial, the District Court announced its intent to hold the ordinance invalid as applied to Walnut because there was insufficient evidence presented to the City Council to support its conclusion that separation of the theater from churches by 1,000 feet was reasonably required to protect the public health, safety and welfare.

After the District Court announced its intended decision, the City held public hearings at which additional evidence was presented supporting separating churches from an adult business by 1,000 feet. Based on the additional evidence, the provision was reenacted by adoption of Ordinance No. 2327, App. O. The District Court refused to take judicial notice of the reenacted ordinance and entered judgment as announced. App. N and M.

In response to the reenactment, Walnut filed a second action in the District Court on July 10, 1984, "Walnut II", attacking the constitutionality of Ordinance No. 2327, and seeking declaratory and injunctive relief and damages against the City, the City Attorney and the City Planning Director. On cross motions for summary judgment, the District Court held that

Ordinance 2327 was unconstitutional and Messrs. Flandrick and Porter were not entitled to immunity. App. I. (Walnut voluntarily dismissed its damage claim against the City.)

The Ninth Circuit's first decision in Walnut I holding the ordinance unconstitutional is contained in an unpublished Amended Memorandum, filed September 30, 1985. App. L.

The City's appeal to this Court from that opinion resulted in an Order vacating the decision and remanding the matter to the Ninth Circuit. *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1042 (1986) (mem.) App. K.

The Ninth Circuit, in turn, vacated the District Court's decision and remanded. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1986). App. H. The Ninth Circuit also vacated and remanded the District Court's decision in Walnut II. App. G.

On remand, the District Court again held that both ordinances were unconstitutional on grounds substantially similar to those in its initial decisions and that Flandrick and Porter were not entitled to immunity. App. C and D. The District Court reinstated all attorney fee awards with interest from the date of the initial awards. App. B. The City appealed. The appeal resulted in the decision which is before this Court.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Decision Holding That Whittier's Adult Business Zoning Ordinances Fails To Provide Reasonable Alternative Avenues of Communication Conflicts With The *Renton* Decision And With Other Post-*Renton* Decisions

This court's opinion in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, established some well-defined constitutional parameters for adult business zoning regulations. However, in *Renton's* wake, uncertainty and lack of uniformity prevails concerning the second prong of the *Renton* test: When does an adult business zoning ordinance allow for "reasonable alternative avenues of communication"?

The *Renton* ordinance allowed adult theaters to locate on 520 acres, representing approximately 5% of the 15.3 square mile land area of the City of *Renton*. This Court rejected the Ninth Circuit's conclusion that the 520 acres did not contain constitutionally "available" sites because a substantial part of the area was occupied by: (1) a sewage disposal site and treatment plant; (2) a horseracing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and (6) a fully developed shopping center. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984) *rev'd., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

In rejecting the argument that Renton's ordinance relegated adult theaters to an "industrial wasteland" that was effectively unavailable because it was either already

occupied or unsuited for use by movie theaters, this Court said:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' *American Mini-Theatres,* 427 U.S. at 71, n.35, 49 L.Ed.2d 310, 96 S.Ct. 2440 (plurality opinion), we have never suggested that the First Amendment compels the government to insure that adult theaters, or any other kinds of speech related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 49 L.Ed.2d 310, 96 S.Ct. 2440 (Powell, J., concurring) ("The inquiry for First Amended purposes is not concerned with economic impact"). In our view, the First Amendment requires ony that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the City, and the ordinance before us easily meets this requirement." (475 U.S. at 42.)

In the case now before this Court, as in the *Renton* case, the Ninth Circuit imposed a heavier burden on the City than is constitutionally required to show that an adult business zoning ordinance allows for reasonable alternative avenues of communication.

The record before the Ninth Circuit showed that the land area of Whittier is 12.32 square miles; that 10.2%,

or 742.5 acres, of the City is zoned for commercial uses (C-2, C-3 and M zones); and that 99.5 acres, or 13.4% of the area zoned for commercial uses, is available to adult businesses. Of the remaining land area in the City, 75.5% is occupied by residential uses and street and railroad rights of way; 1% by office buildings; and the remaining 13.3% is occupied by pubic and quasi-public uses, such as parks and schools, a courthouse and a civic center.

Whittier is approximately two-thirds the size of Renton in area. Although it is geographically smaller than Renton, Whittier has more than twice as many residents. This difference in population density explains why Whittier has less gross acreage zoned for commercial and industrial uses than Renton. When the differences in land area and population density are taken into account, the approximately 1.4% of Whittier which is available for adult businesses to locate compares favorably to the approximately 5% permitted by the Renton ordinance and approved by this Court.

The evidence before the court also showed that the sites available to adult businesses in Whittier are located throughout the City, along major thoroughfares, in economically viable areas, including in one of Whittier's two shopping centers, and that a number of adult theaters were located a short distance from Whittier.

The Ninth Circuit found that the 99.5 acres zoned for adult uses were not "available" by shifting its focus from the potential sites available for Walnut to relocate, to "the number of potential sites the ordinance leaves available for the location of adult businesses" (App. A13), speculating that if other adult businesses desired to locate in the City, they would be unable to do so. App. A19. The Ninth Circuit held that the 1,000

foot separation requirement between two adult businesses in the Whittier ordinance was an "intrinsic limitation," that made "an estimation of total available acreage [ ] next to meaningless." App. A13. The Ninth Circuit concluded that the City's regulations "would only allow a small handful of adult businesses to operate within the City of Whittier." App. A15.

The Ninth Circuit distinguished Whittier's ordinance from the Renton ordinance on the additional grounds that the Renton ordinance regulated only adult theaters and not other types of adult businesses (App. A19) and concentrated adult businesses rather than dispersing them. App. A16. In *Renton*, however, this Court refused to speculate on what effect Renton's ordinance would have on parties not before the Court (475 U.S. at 52-53), and held that the constitutionality of an adult business ordinance does not depend on whether the effect is to concentrate or disperse adult businesses. (475 U.S. at 52.)

The Ninth Circuit also distinguished *Renton* on the ground that in *Renton,* the theater had not yet opened when Renton's ordinance was adopted. This is a distinction without a difference as the effect of Whittier's ordinance would be the same whether or not the Pussycat Theater were in existence at the time the ordinance was adopted—it still would be required to locate at a site permitted by the ordinance.

The Ninth Circuit relied on cases decided prior to this Court's decision in *Renton.* Citing *Alexander v. City of Minneapolis,* 698 F.2d 936 (8th Cir. 1983), the Ninth Circuit noted that "the 12 sites in that case significantly outweigh the number of sites allowed under the City's ordinance in this case." App. A17.

Minneapolis has a population of approximately 369,000 people, and encompasses 55 square miles (The World Almanac and Book of Facts 1986; p. 665); it has over 5 times as many people as Whittier and is 4.5 times as large. The City of Whittier and the City of Minneapolis are not comparable.

The Ninth Circuit's reliance on *Alexander* was misplaced for the further reason that, at the time the Minneapolis ordinance was adopted, there were over thirty adult uses operating in the City, including 5 adult theaters and 10 adult bookstores. All but one or two of these would have had to relocate and compete for space with an additional 18 regulated adult uses. As there were at most only twelve possible sites for relocation, sites were not available for all the bookstores and theaters which would be required to relocate, and there would not have been a single location in Minneapolis for the opening of new theaters or bookstores. (698 F.2d at 938.)

In this case, there is one adult theater in the City which would have to relocate; thus Whittier's ordinance does not have the effect of the Minneapolis ordinance. There was no evidence before the court that Walnut would have to compete with other adult businesses for the available sites, and there was no basis in the record for assuming that others desired to open and operate adult businesses in the City, or that if there were others who desired to operate an adult business in the City, they would be unable to do so.

CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983), the other case relied on by the Ninth Circuit, involved an adult business ordinance adopted by the town of Wyoming, Michigan, a city of 60,000 residents with an

area of 25 square miles. While comparable in population to Whittier, the town is 2.5 times larger than Whittier in area.

The *Henline* court found that the Wyoming ordinance denied access to adult businesses because the ordinance permitted only 2 to 4 adult businesses in a half-mile strip of the city, and concentrated the uses in one area. In contrast, the Ninth Circuit in this case found that the "small handful" of sites left open by the Whittier ordinance were in 3 separate areas of the City. App. A15.

Federal and state courts addressing the issue after *Renton* have interpreted what is meant by "reasonable alternative avenues of communication" in a variety of ways, being similar only in that all have interpreted *Renton* more liberally than has the Ninth Circuit.

In *S & G News v. City of Southgate,* 638 F.Supp. 1060 (E.D. Mich. 1986) *aff'd.* 819 F.2d 1142 (6th Cir. 1987), the court upheld an ordinance which, like Whittier's, limited adult businesses to certain zones and then dispersed adult uses within those zones. The court held:

> "Southgate clearly allows sufficient alternative means of expression, since adult uses are allowed in C-3 commercial districts, which comprised 2.3 percent of the land in Southgate." (638 F.Supp at 1066.)

The court looked only at the gross acreage available under Southgate's ordinance without considering the effect of the further restrictions in the ordinance that not more than two adult uses may locate within 1,000 feet of each other or within 500 feet of a residence.

In *Lindsay v. Papageorgiou,* 751 S.W.2d 544 (Tex. App. 1988), the court upheld an adult business

ordinance adopted by Harris County, Texas. The court found the ordinance did not violate the First Amendment because it did not on its face ban the operation of adult uses or limit their number. The court rejected the argument that the County had failed to make an offer of proof that there were any alternative sites available, stating:

> "The regulations limit only the locations where appellee may operate her enterprise; therefore, she has not been denied reasonable opportunities to conduct her business without violating regulations. The county is under no duty to insure that appellee be afforded a commercially viable site in which to locate. *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. at 932.
>
> "The regulations in question impose only a minimal or incidental burden on protected expression, as they are nothing more than a limitation on the place where such expression may be exercised; thus, they meet appellee's First Amendment challenge." (751 F.2d at 550.)

In *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987) *cert. denied*, ___ U.S. ___, 98 L.Ed.2d 978, 108 S.Ct. 1013 (1988), the City's adult business ordinance restricted adult uses to an area which totalled 0.058 square miles and contained only 0.23 of 1% of the land area of the City. The Court, by a vote of 2-1, remanded the case to the District Court to determine whether the ordinance severely restricts First Amendment expression. Senior Circuit Judge Brown dissented from this portion of the opinion, finding that the ordinance allowed adult uses to locate within the heart of Ann Arbor's central business zone and did not, for all practical purposes, eliminate them. (824 F.2d at 493.)

In *Town of Islip v. Caviglia,* 532 N.Y.S.2d 783, 141 App. Div. 2d 148 (1988), after reviewing numerous decisions of the state and federal courts issued since *Renton,* the court determined that an ordinance which impacted existing adult uses and limited adult businesses to industrial zones was constitutional because the town contained over 6,000 acres zoned for industrial uses which were scattered throughout the town in various stages of development and contained 12 miles of running footage on open roads. In making its determination, the court did not consider how availability of sites was affected by the ordinance's requirement that an adult business not be located within one-half mile radius of another adult business. (532 N.Y.S.2d at 785, n.2.)

The California state courts have given cities wide berth in regulating adult businesses and have consistently upheld ordinances substantially similar to Whittier's. (See, e.g. *City of Vallejo v. Adult Books,* 167 Cal.App.3d 1169, 213 Cal. Rptr. 143 (1985); *Strand Property Corp. v. Municipal Court,* 148 Cal.App.3d 882, 200 Cal. Rptr. 47 (1983); *City of Whittier v. Walnut Properties, Inc.,* 149 Cal.App.3d 633; *County of Sacramento v. Superior Court,* 137 Cal.App.3d 448, 187 Cal. Rptr. 154 (1982); *Walnut Properties, Inc. v. City Council of Long Beach,* 100 Cal.App.3d 1018, 161 Cal. Rptr. 411 (1980).) In *City of Vallejo,* the court found that Vallejo's ordinance was facially broader than that in *Young* and that it had no grandfather clause:

> "Still, the ordinance does not impose an outright ban; . . . Permissible locations available to adult uses are restricted by the ordinance, but not legislated out of existence." (100 Cal.App.3d at 1180.)

Two adult business zoning cases are pending before this court on petitions for writ of certiorari, *M.E.F. Enterprises, Inc. v. Houston,* 837 F.2d 1268 (5th Cir.) *petition for cert. filed* 57 U.S.L.W. 3001 (June 10, 1988) (No. 87-2052), and *M.J.R. v. Dallas,* 837 F.2d 1298 (5th Cir.) *petition for cert. filed* 57 U.S.L.W. 3001 (June 13, 1988) (No. 87-2051). Both cases present the questions of what constitutes reasonable alternative avenues of communication under *Renton* and whether adult business zoning ordinances may be applied to existing businesses.

These decisions illustrate the need for guidance from this Court. Does an ordinance provide "reasonable alternative avenues of communication" if it does not on its face ban adult businesses, or must so-called "intrinsic limitations" in the ordinance be considered? Does the constitutionality of an adult business zoning ordinance turn on the particular geographic characteristics of the city involved? Is gross acreage or the number of sites determinative? Is land area, population, population density, and/or the particular location of sites within a City to be considered? Is an adult business zoning ordinance which regulates only adult theaters to be judged under a standard different than that which is used for ordinances which regulate all adult uses? Is an ordinance which affects existing adult businesses subject to a different standard than an ordinance which affects only new adult uses?

Hundreds of cities and counties in California[1] and hundreds, if not thousands, more in other jurisdictions

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[1] On the prior occasion of this case coming before this Court, 74 California cities joined as amici curiae on behalf of Whittier.

have adopted ordinances regulating the location of adult businesses. Because so many jurisdictions are involved, it is important for this Court to provide an analytical framework so that cities and counties will know when they have provided "adequate alternative channels of communication" without the necessity of engaging in protracted legal battles, producing conflicting and contrary legal opinions.

2. The Attorney Fee Awards And Interest Thereon For Work Done On Vacated Portions Of A Case And For Which No Detailed Time Records Were Provided Was Erroneous

a. Fees Should Not Be Awarded For Work Done On Unsuccessful Claims In Vacated Decisions.

The Ninth Circuit affirmed the District Court's award of attorneys fees to Walnut. App. A27. The District Court awarded Walnut all the fees it requested for all time spent litigating "Walnut I", as follows:

- $39,035.00 for work in the District Court from May 7, 1981 to May 21, 1984, and interest thereon from and after May 21, 1984.

- $25,478,00 for work in connection with the appeal which culminated in the Amended Memorandum of September 30, 1985, and interest thereon from January 21, 1986.
- $18,400.00 for services rendered since January 21, 1986. App. B.

Entitlement to fees under 42 U.S.C. § 1988 is limited to prevailing parties. Even if this Court were to allow the Ninth Circuit's decision to stand, it should rectify the injustice of allowing an award of attorney fees for work done in the trial and appellate courts on issues on which Walnut did not prevail and which resulted in District Court and Ninth Circuit decisions vacated by this Court.

Walnut's initial success in the District Court rested on the court's conclusion that the City had not provided sufficient justification for prohibiting Walnut from operating within 1,000 feet of a church App. M. The District Court's findings also stated that the City had failed to meet its burden of proving that separating a church from an adult theater furthered a compelling government interest unrelated to suppression of free expression, the 1,000 foot separation between an adult theater and a church made it impossible to operate an adult theater in the central business district of Whittier, and the ordinance would have the effect of total exclusion of adult theaters from the City. App. N.

On appeal, the Ninth Circuit affirmed the District Court decision, holding that the City could not rely on the experience of other cities to justify separating churches from adult businesses by 1,000 feet; Walnut's expert testified that there were only twelve acres in the City, in a shopping center, where adult businesses were

permitted to locate; this area was not available because of "the reluctance of a shopping center owner to lease to such a theater and the unlikelihood of an appropriate vacancy"; and "a motivating factor" of the City was to suppress speech. App. L.

This Court's opinion in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, rendered the District Court and Ninth Circuit opinions erroneous in every respect, resulting in the Order of this Court vacating the Ninth Circuit opinion and remanding the matter to that court, with costs to the City. App. K.

The Ninth Circuit, in turn, vacated the District Court's opinion and remanded. *Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331 (9th Cir. 1986). App. H. The Ninth Circuit also awarded costs to the City. App. E.

Upon remand, the District Court entered Findings of Fact and Conclusions of Law substantially similar to those entered initially in 1984. App. F. The Ninth Circuit disregarded the District Court findings, and affirmed on the basis that the ordinance allowed "only a small handful" of adult businesses to locate in Whittier. App. A. This was not the issue on which Walnut initially prevailed either in the District Court or in the Ninth Circuit for which the attorney fees were awarded.

Most of the fees awarded for work done after January 21, 1986 related to Walnut's effort to persuade this Court to affirm the Ninth Circuit's decision and then, when that failed, to persuade the Ninth Circuit to reinstate its prior decision without remand to the District Court. That attempt also was unsuccessful.

Award of fees to Walnut is contrary to *Hensley v. Eckerhart,* 461 U.S. 424 (1983), holding that a party is not entitled to fees for work done on unsuccessful

claims, and *Hanrahan v. Hampton,* 446 U.S. 754 (1980), holding that a plaintiff is not entitled to a fee award where he did not prevail on the merits in the appellate court, but had secured only a reversal and remand for a new trial. The instant case differs somewhat from *Hanrahan* in that Walnut was successful after remand in persuading the District Court and the Ninth Circuit of the merits of its claim. However, it would be an anomaly for Walnut to be deemed a prevailing party for purposes of the attorney fees challenged here when both the decisions for which it seeks fees were vacated, and costs were awarded to the City. (*See Toussaint v. McCarthy,* 826 F.2d 901, 904, n.3 (9th Cir. 1987); *Jordan v. Allain,* 619 F.Supp. 98, 109-110 (D.C. Miss. 1985); *see also Buin v. Baughard,* 687 F.2d 859 (6th Cir. 1982) *rev'd, Kelly v. Metropolitan County Bd. of Educ.,* 773 F.2d 677 (6th Cir. 1985).

b. Interest on the Awards

The fees which the Ninth Circuit affirmed include interest accruing from the dates of the initial attorney fee awards.

The attorney fee awards were vacated along with the decisions on the merits. App. H4-5, n. 1. As "a judgment vacated on appeal is of no further force and effect" (*Riha v. International Telephone & Telegraph,* 533 F.2d 1053, 1054-55 (8th Cir. 1976), there is no basis for awarding interest from the date of the original fee orders.

In *Hysell v. Iowa Public Service Co.,* 559 F.2d 468, 476 (8th Cir. 1977), the court held that where a judgment has been vacated on appeal, only the date of entry of the second judgment could be the basis for calculating post-judgment interest on attorney fees under 28 U.S.C. § 1961.

This issue was recently before this Court in *Chattem, Inc. v. Bailey,* 838 F.2d 149 (6th Cir.) *cert. denied,* ___ U.S. ___, 100 L.Ed.2d 931, 108 S.Ct. 2831 (1988). In dissenting from the denial of certiorari, Justice White noted the conflict among the circuits on the proper application of 28 U.S.C. § 1961 where, as here, a judgment is later vacated on appeal. (100 L.Ed.2d at 932.)

c. Failure to Submit Proper Documentation

The City has opposed the awards of attorney fees throughout the course of this litigation on the ground, *inter alia,* that Walnut's counsel did not provide adequate documentation to substantiate the number of hours he claimed were spent on the case. These arguments were rejected, and Walnut was awarded all fees requested based solely on the declarations of Walnut's counsel, containing nothing more than vague descriptions regarding how large blocks of time were spent.

The Court of Appeals for the District of Columbia, First, Second, and Tenth Circuits require contemporaneous time records for recovery of fees. *National Assn. of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1327 (D.C. Cir. 1982); *Grendel's Den, Inc. v. Larkin,* 749 F.2d 945, 952 (1st Cir. 1984); *New York State Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1148 (2d Cir. 1983); *Ramos v. Lamm,* 713 F.2d 546, 553-54 (10th Cir. 1983). Other courts accept detailed reconstructions in lieu of contemporaneous time records, but reduce claimed hours for poor recordkeeping. *Yohay v. City of Alexandria Employees Credit Union,* 827 F.2d 967, 974 (4th Cir. 1987); *Lightfoot v. Walker,* 826 F.2d 516, 522, n.7 (7th Cir. 1987); *Haitian Refugee Center, Inc. v. Smith,* 644 F.Supp. 382, 391 (S.D. Fla. 1984)

aff'd, 791 F.2d 1489, *as amended,* 804 F.2d 1573 (11th Cir. 1986).

The Ninth Circuit is one of the few remaining jurisdictions to permit the award of full attorney fees without either contemporaneous time records or some other detailed presentation of how attorney time was spent on a case.

CONCLUSION

For the reasons stated above, this Court should accept this case for plenary review.

DATED: February 7, 1989

Respectfully submitted,

J. ROBERT FLANDRICK,
City Attorney,
CITY OF WHITTIER
BURKE, WILLIAMS & SORENSEN
VIRGINIA R. PESOLA

By:J. ROBERT FLANDRICK
Counsel for Petitioner
CITY OF WHITTIER

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 7, 1989, I served the within *Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stanley Fleishman, Esquire
2049 Century Park East
Suite 3160
Los Angeles, California 90067

The Honorable John Van
De Kamp
Attorney General
555 Capitol Mall
Suite 350
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 7, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)

88-1322

Supreme Court, U.S.
FILED
FEB 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1988

THE CITY OF WHITTIER, a Charter City,

Petitioner,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURKE, WILLIAMS & SORENSEN

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WALNUT PROPERTIES, INC., a California corporation; and Vincent Miranda, Plaintiffs-Appellees,

v.

CITY OF WHITTIER; M.D. Klaxton; R.L. Henderson; L.A. Strong; James Bale, as Chief of Police, City of Whittier; J. Robert Flandrick, as City Attorney, City of Whittier; and Whittier City Council, Defendants-Appellants.

WALNUT PROPERTIES, INC., a California corporation, Plaintiff-Appellee,

v.

J. Robert FLANDRICK; James Bale; City of Whittier; Whittier City Council; and Elvin Porter, Defendants-Appellants.

WALNUT PROPERTIES, INC., a California corporation; and Vincent Miranda, Plaintiffs-Appellees,

v.

CITY OF WHITTIER; M.D. Klaxton, R.L. Henderson, L.A. Strong, Gene Chandler, and V.A. Lopez, as Members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and J. Robert Flandrick, as City Attorney of the City of Whittier, Defendants-Appellants.

Nos. 86-5645, 87-5748, 87-5859 and 87-5956.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 10, 1987.

Decided Nov. 9, 1988.

Following remand from the United States Supreme Court, 475 U.S. 1042, 106 S.Ct. 1255, 89 L.Ed. 566, and the Ninth Circuit Court of Appeals, 808 F.2d 1331 and 807 F.2d 178, the United States District Court for

the Central District of California, Manuel L. Real, Chief Judge, found twice-enacted municipal ordinance regulating adult businesses unconstitutional. On appeal after remand, the Court of Appeals, Hug, Circuit Judge, held that: (1) city's *Younger*-type abstention challenge was untimely; (2) in light of stay in state proceedings, abstention was not appropriate; (3) zoning ordinance completely foreclosed reasonable opportunity to operate adult businesses within city and was in violation of First Amendment; and (4) city attorney and planning director had qualified immunity from suit for advising city counsel to enact ordinance after it had been found unconstitutional.

Affirmed in part and reversed in part.

1. Federal Courts ⇐—916

City's failure to present its *Younger*-type abstention challenge to district court's resolution to adult business ordinance on prior two appeals precluded its request for abstention on third appeal.

2. Federal Courts ⇐—56

State's voluntary stay of challenge to adult business municipal ordinance in state court pending federal resolution as well as potential for duplicitious litigation undermined city's claim for *Younger*-type abstention; since state proceedings were stayed, there was no ongoing state proceeding to meet abstention doctrine requirements.

3. Federal Courts ⇐—42

Concerns for federalism and comity are not present to support a claim for *Younger*-type abstention where a state has voluntarily stayed its own proceedings pending resolution in a federal forum.

4. Constitutional Law ⇐—90.4(1, 4)
Zoning and Planning ⇐—76

Zoning ordinance, which contained 1,000 foot separation requirements between adult businesses and other adult businesses, schools, churches, or parks and further had 500 foot separation requirement between adult businesses and residential areas or liquor establishments violated the First Amendment; ordinance completely foreclosed reasonable opportunity to operate an adult theater within city, forced closure of all adult businesses, and did not provide for alternative avenues of communication. U.S.C.A. Const.Amend. 1.

5. Civil Rights ⇐—13.8(3)

City attorney and city planning director were entitled to qualified immunity in civil rights suit by adult theater challenging city's reenactment, upon their recommendation, of previously determined unconstitutional adult business zoning ordinance; while prior district court opinion had found earlier ordinance unconstitutional, reenactment of ordinance after new counsel study and findings had been prepared, and lack of circuit precedent on point demonstrated that reenactment of ordinance was not clearly in violation of plaintiff's rights. U.S.C.A. Const.Amend. 1, 42 U.S.C.A. § 1983.

J. Robert Flandrick and Virginia Pesola, City Attys. and Burke, Williams & Sorensen, Los Angeles, Cal., for defendants-appellants.

Stanley Fleishman, Fleishman, Fisher & Moest, Los Angeles, Cal., for plaintiffs-appellees.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, HUG and REINHARDT, Circuit Judges.

HUG, Circuit Judge:

In this action, Walnut Properties, Inc. ("Walnut") challenges the constitutionality of a municipal zoning ordinance which regulates the location of adult businesses. The city of Whittier, California ("City") adopted an ordinance prohibiting, among other things, the location of adult businesses within 1,000 feet of a church. Walnut's adult "Pussycat" Theater violates that provision. At issue is whether enforcement of the ordinance would deprive Walnut of its First Amendment rights. This case also involves issues of abstention and immunity. We affirm the district court's finding that the ordinance is unconstitutional on the basis that it fails to provide for reasonable alternative avenues of communication.

FACTS

In May, 1977, Walnut began operation of its theater and exhibited "adult" films. In June, 1977, the City enacted an "urgency" ordinance imposing locational restrictions on adult businesses. The ordinance allowed the City's planning department time to study the problems associated with adult businesses and to consider potential zoning remedies. A study was conducted, and it revealed that, at that time, 13 adult businesses were located within the city boundaries; these operations included massage parlors, nude model studios, adult bookstores, and an adult theater (Walnut's Pussycat Theater). According to the City, the study indicated several undesirable secondary effects associated with the adult businesses.

Following the study, the City reenacted the ordinance several times. The City brought an action against Walnut in Los Angeles Superior Court seeking to enjoin Walnut from operating its theater because it violated the restrictions. The course of proceedings at the state level has not yet ended; instead, those proceedings have been stayed pending resolution of the federal proceedings.

The present action arises from the City adoption of Ordinance No. 2257, on March 24, 1981. Like the preceding ordinances, that ordinance allowed adult businesses in commercial and industrial zones, but imposed certain separation requirements. The ordinance prohibited adult businesses within 500 feet of residential lots and establishments holding liquor licenses, and within 1,000 feet of schools, churches, parks, or other adult businesses.

On May 7, 1981, Walnut filed an action in federal district court seeking an injunction to restrain the City from enforcing the ordinance on the basis that it was unconstitutional. The district court held invalid that part of the ordinance prohibiting the location of an adult business within 1,000 feet of a church. The court rested its holding on the basis that there were insufficient facts to prove that the prohibition furthered a compelling state interest, and that a motivating factor in enacting the ordinance was the desire to restrict Walnut's exercise of First Amendment rights.

Less than one week after the Findings of Fact and Conclusions of Law were rendered by the district court declaring the ordinance unconstitutional, City Attorney Flandrick advised the city council that it would be appropriate to consider readoption of that portion of the ordinance held unconstitutional if sufficient evidence were present to support the provision. In response, the

City held public hearings on the separation requirement, and the City's planning director, Mr. Porter, began gathering evidence to remedy the deficiency found by the district court. Specifically, Mr. Porter wrote to several ministers of churches located in the City soliciting comments that would develop a factual basis for the ordinance. The responses from ministers were compiled in an April 9, 1984 staff report along with articles discussing the effects of adult businesess on children, law review articles reviewing adult business ordinances, and studies of similar ordinances in other cities. The report recommended readopting the 1,000-foot separation requirement between churches and adult businesses.

The city council did so, enacting Ordinance No. 2327 on May 22, 1984. That ordinance essentially amounted to a reenactment of the previous ordinance held unconstitutional by the district court just two months earlier, but the city council justified the reenactment on the basis that the recent study remedied the evidentiary shortfalls of the prior ordinance.

In response to this reenactment, Walnut filed another action in the district court on July 10, 1984, attacking the constitutionality of Ordinance No. 2327. Walnut sought the following: (1) a declaration that the ordinance was invalid insofar as it prohibited an adult theater from operating within 1,000 feet of a church; (2) an injunction against enforcement of the ordinance; and (3) damages against the City, City Attorney Flandrick, and Planning Director Porter, alleging that the reenactment of the ordinance violated its constitutional rights.

Walnut filed a motion for partial summary judgment declaring Ordinance No. 2327 unconstitutional. Defendants Porter and Flandrick filed a cross-motion for summary judgment or, in the alternative, partial

summary judgment, asserting that Ordinance No. 2327 was constitutional and that, in any event, they were entitled to absolute immunity, or alternatively, qualified immunity. The district court denied the defendants' motion and granted partial summary judgment to Walnut declaring the ordinance unconstitutional.

Appeal was taken by the City from both of the district court decisions. For simplicity's sake, we refer to the first action—that regarding Ordinance No. 2257—as *Walnut 1;* we refer to the second action—involving Ordinance No. 2327—as *Walnut 2.*

The district court's decision in *Walnut 1* was affirmed by this circuit. *Walnut Properties, Inc. v. City of Whittier,* Nos. 84-5755, 84-6087 (9th Cir.1985) (mem.) [762 F.2d 1020 (Table)]. The Supreme Court, however, summarily vacated our judgment and remanded for reconsideration in light of *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, *reh'g denied,* 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986); *City of Whittier v. Walnut Properties, Inc.,* 475 U.S. 1042, 106 S.Ct. 1255, 89 L.Ed.2d 566 (1986) (mem.). We then vacated the district court's decision and instructed the court on remand to consider the evidence in light of *Renton. Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331, 1333 (9th Cir.1986). The district court again found the ordinance unconstitutional and this appeal was taken by the City. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

We rendered our decision in *Walnut 2* following our consideration of *Walnut 1* upon remand from the Supreme Court. *Walnut Properties, Inc. v. City of Whittier,* 807 F.2d 178 (9th Cir.1986) (order). We felt it necessary to vacate the district court's decision in

Walnut 2, because, in deciding that Ordinance No. 2327 was unconstitutional, the district court had relied upon our original decision in *Walnut 1*, which was later vacated by the Supreme Court. We remanded *Walnut 2* for reconsideration in light of *Renton* and this circuit's decision on remand in *Walnut 1*. On remand, the district court concluded that, even in light of those decisions, Walnut was entitled to partial summary judgment declaring unconstitutional the separation requirement between a church and an adult business. The court also rejected the defendants' immunity claims, and denied the City's motion for summary judgment. This appeal is from that portion of the district court's order denying Porter and Flandrick immunity. Our jurisdiction over a denial of a motion for summary judgment on an issue of immunity is established by *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). We have consolidated *Walnut 1* and *Walnut 2*.

On appeal, the City makes several arguments. First, it asserts that the district court erred in finding the ordinance[1] unconstitutional. Second, it argues that the district court should have abstained from exercising its

[1]Although the two actions here involve two separate ordinances, this is irrelevant for our purposes. The second ordinance, No. 2327, was identical in substance to the first ordinance, No. 2257. Though the second ordinance could be distinguished from the first on the basis that an additional study purportedly justified its-enactment, this distinction has no bearing on our holding. We rest our decision on the basis that *neither* ordinance left open adequate alternative channels of expression. The two ordinances were identical in that respect, and thus we need not concern ourselves with which ordinance is the focus of our constitutional inquiry. Accordingly, mootness is not an issue here. *See Tollis, Inc. v. San Bernardino County,* 827 F.2d 1329, 1331-32 (9th Cir.1987) ("Since the relevant requirements of the temporary ordinance have been manifestly preserved unchanged in [the later ordinance], the controversy before us is not moot.")

jurisdiction in the first instance and on remand, given that the ordinance was the subject of an ongoing state proceeding.[2] Third, the City asserts that the district court erred in finding that Porter and Flandrick were not entitled to either absolute or qualified immunity. We affirm the district court's decision in *Walnut 1*. We find that the ordinance was unconstitutional as applied to Walnut, and that the district court properly exercised its jurisdiction. However, we reverse the district court's decision in *Walnut 2* because we believe that Porter and Flandrick were entitled to qualified immunity for their actions. We affirm all of the attorneys' fees awards made in connection with both actions.

Abstention

Initially, we address the threshold issue of abstention. The City contends that, in view of the state proceeding in the California court, the district court should have abstained from exercising its jurisdiction in *Walnut 1* both in the first instance and on remand. *See Younger*

[2]In this vein, the City also argues that the California Court of Appeal's decision in this case should operate as res judicata to bar our determination of the constitutional issues. This is the third time the City attempts to make such an argument. We rejected the City's contention when we first heard the *Walnut 1* appeal. When the case was again before us on remand from the Supreme Court, we expressly reinstated that part of our vacated memorandum disposition. *See Walnut Properties,* 808 F.2d at 1333 n.1. Our view on the matter has not changed. We note also that the basis on which we hold the ordinance unconstitutional—namely that it fails to provide adequate alternative locations—was an issue never even resolved by the California Court of Appeal. That court expressly remanded the case to the trial court to make factual determinations regarding alternative sites, and those proceedings have been stayed. *See City of Whittier v. Walnut Properties, Inc.,* 149 Cal.App.3d 633, 644-45, 197 Cal.Rptr. 127 (1984) (directing the trial court on remand to "make the necessary rulings . . . as to the availability of alternate sites in the City of Whittier. . . .").

v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). This contention has no merit.

[1] First, it is far too late to challenge the district court's decision to proceed initially with the case. The first judgment of the district court was appealed to this circuit and then to the Supreme Court. If the City wished to challenge the district court's refusal to abstain, it should have done so at the time of the original appeals. A review of our initial disposition affirming the district court, and of our opinion following remand from the Supreme Court, indicates that the abstention issue was never raised on appeal.[3] The City cannot now challenge the first decision of the district court on *Younger* grounds when it failed to confront us with that issue the last two times the case was before us. *See, e.g., Umphlet v. Connick,* 815 F.2d 1061, 1062-63 (5th. Cir.1987) (state defendants voluntarily submitted to adjudication in a federal forum when they did not raise abstention arguments on appeal); *Midkiff v. Tom,* 702 F.2d 788, 803 (9th Cir.1983) (Poole, J. concurring).

Obviously, since we remanded the case following Supreme Court review, we felt that abstention was not appropriate. Our view has not changed. Though *Younger* abstention has been extended to civil proceedings in which important state interests are implicated, abstention remains the exception, rather than the rule. *World Famous Drinking Emporium v. City of Tempe,* 820 F.2d 1079, 1082 (9th Cir.1987) (as amended). "Absent significant countervailing interests, the federal courts are obliged to exercise their jurisdiction." *Id.* This circuit imposes three requirements which must be met in order for a federal court properly to invoke the *Younger*

[3]Indeed, in its brief, the City never asserts that it raised this issue on appeal. It simply maintains that it raised the issue to the district court both initially and on remand.

abstention doctrine: "(1) ongoing state judicial proceedings; (2) implication of an important state interest in the proceedings; and (3) an adequate opportunity to raise federal questions in the proceedings." *Id.*

[2] We review *de novo* a refusal to abstain under *Younger*. *Id.* at 1081. Under the circumstances at hand, the district court quite properly proceeded with the case and issued a decision under our mandate. The City's argument fails on the basis that the first requirement for abstention was not met. The state court proceedings in this case were not "ongoing" when the district court rendered its second decision. The California Court of Appeals had remanded the state action to the trial court, and the state trial court had stayed the remand proceedings pending resolution of the federal proceedings. Thus, when the federal case was in the district court on remand there were no truly "ongoing" proceedings which would justify abstention. *See Andrea Theaters v. Theater Confections, Inc.*, 787 F.2d 59, 63-64 (2d Cir.1986).

[3] The City misconstrues the nature of *Younger* abstention. That doctrine is propelled by concerns of federalism and comity. *See Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479, 97 S.Ct. 1898, 1903, 52 L.Ed.2d 513 (1977). Those concerns are not present where a state court has stayed its own proceedings pending resolution of the case in a federal forum. In such an instance, federal proceedings do not " 'unduly interfere with the legitimate activities of the States.' " *Id.* (citations omitted). If the state court voluntarily chooses to have the case decided by a federal court, "principles of comity do not demand that the federal court force the case back into the state's own system." *Id.* at 480, 97 S.Ct. at 1904. Moreover, a decision to abstain at this late date would result in such duplicious

litigation and waste of resources that it would greatly frustrate our interests in judicial economy, with no apparent justification.

Constitutionality of the Ordinance

[4] When we remanded *Walnut I* to the district court after the Supreme Court vacated our earlier disposition, we instructed the district court to evaluate the ordinance in light of the principles elucidated in *Renton*. *See Walnut Properties,* 808 F.2d at 1333. The court did so, and still found the ordinance unconstitutional in three respects. First, it found that the ordinance presumptively violated the First Amendment because it was enacted for the predominant purpose of suppressing Walnut's First Amendment rights. Second, it found that the ordinance did not further a substantial governmental interest. Finally, it found that the ordinance denied Walnut a reasonable opportunity to operate its theater within the City. Because we affirm on the third basis, we need not address whether the district court was correct in holding the ordinance unconstitutional on the first two grounds.

In *Renton,* the Court held that an ordinance regulating the location of adult theaters violates the First Amendment if it "effectively den[ies] [theater owners] a reasonable opportunity to open and operate an adult theater within the city. . . ." *Renton,* 475 U.S. at 53-54, 106 S.Ct. at 932. In finding that the City's ordinance did not allow Walnut a reasonable opportunity to operate its adult theater, the district court accepted the testimony of Walnut's expert witness that only 12 acres were available to adult businesses under the ordinance. The court also noted that the ordinance "makes it impossible to operate an adult theater in the central district of Whittier." Moreover, the court found that

"since Walnut has the only theater in the City exhibiting adult films its elimination would leave the City without any theater showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the City."

We must accept the district court's factual findings unless we are left with a firm conviction that they are clearly erroneous. *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1464 (9th Cir.1985). Of these findings, the City seriously disputes only the district court's determination of available acreage left to adult businesses. At trial, the city planning director, Mr. Porter, and Walnut's expert witness, Mr. Metcalfe, disagreed about the availability of certain sites for an adult business under the ordinance. This resulted in a discrepancy in their estimations of available acreage. Mr. Porter testified that the ordinance left 99.5 acres available for adult businesses while Mr. Metcalfe estimated that only 12 acres were available. We need not decide, however, whether the district court's acceptance of Mr. Metcalfe's figure was clearly erroneous, as the difference in acreage has no impact on the result we reach. For the purposes of argument we shall use the evidence most favorable to the City, that is, the 99.5-acre figure.

We review *de novo* the district court's determination that the ordinance did not allow Walnut a reasonable opportunity to operate its theater elsewhere. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Our inquiry focuses on the number of potential sites the ordinance leaves available for the location of adult businesses. We first note that, under the terms of the ordinance in question, an estimation of total available acreage is next to meaningless. This is not a case in which a greater amount of acreage would

necessarily allow a greater number of sites for adult businesses. Instead, this ordinance imposes a 1,000-foot separation requirement between any two adult businesses, thereby preventing such businesses from clustering within a given area. The number of sites available to adult businesses under the ordinance, therefore, depends not so much on the total amount of acreage available under the zoning scheme, but on how that acreage is dispersed throughout the City. For example, if the zoning scheme concentrates the available acreage in just one area, most of the acreage would be consumed by the required 72-acre buffer zone surrounding each adult business.[4] In contrast, if the total available acreage is dispersed throughout the City in many small parcels—each at least 1,000 feet from the others—many more adult businesses could locate in the City because the available locations would already be adequately set apart from other sites at which adult businesses might locate. Thus, a total of 99.5 available acres is susceptible to a wide variation in the number of locations it allows for adult businesses; the number of potential sites depends, in large part, upon whether the available acreage is concentrated or dispersed.

Unfortunately, the district court made no findings with respect to the actual number of potential sites available for adult businesses under the City's ordinance, nor did testimony at trial reveal any figures. However, the deficiency does not hinder us in deciding the case because we can roughly estimate the number of available sites based on a map in the record and other information deduced at trial.

A copy of the City's official zoning map was submitted as an exhibit at trial. The map indicates the areas left

[4]A circle with a radius of 1,000 feet encompasses approximately 72 acres.

for adult businesses after the restrictions of the ordinance are applied to the City's geographical area.[5] (*Walnut I;* ER 74, Exh. A attached to Declaration of Porter.) The map indicates just three areas in which adult businesses may locate.[6] Thus, we have a situation in which the available acreage is concentrated. The three areas, according to Mr. Porter, comprise 99.5 acres, or 1.4% of the city's land. *See Walnut I,* 808 F.2d at 1337. Though the boundaries are not so precisely drawn as to permit an estimation of the actual acreage encompassed within each area, it is quite obvious that together the areas would only allow a small handful of adult businesses to operate within the city of Whittier, in light of the required 72-acre buffer zone imposed by the ordinance.

We need not venture farther into the art of cartography to find that this ordinance does not allow sufficient alternatives for relocation of adult businesses. Even using

[5]In so doing, the map incorporates Mr. Porter's presumptions regarding the availability of certain sites under the ordinance—presumptions which were set forth in his testimony at trial.

[6]One of these areas may not be available for adult businesses, but for the purposes of our analysis we shall assume it is. The availability of space within the Whitwood Shopping Center was in dispute at trial. The shopping center consists of 30 parcels. Parts of the shopping center are within 500 feet of a residential zone. An adult business could locate within the center unless the shopping center is considered a single lot under the City's zoning plan. If the center is viewed as one single lot, the entire area is considered within 500 feet of a residential zone and the center is precluded from providing a location for an adult business. *See* RT at 69. The district court never reached a conclusion on whether, as a matter of zoning law, the shopping center could be considered one lot or a group of separate lots. We need not address whether the shopping center provides an area in which adult businesses could locate. Instead, we assume it does, as the addition of one area does not significantly increase the availability of alternative sites so as to boost the ordinance above the threshold of constitutionality.

the City's proffered evidence, the paucity of alternative sites is glaring. Moreover, we have engaged in no inquiry whatsoever as to whether these sites are presently available for sale or lease, or will likely be available in the future. To hold, as the City urges, that there are adequate alternatives available for expression of this sort would make a mockery of First Amendment protections and would render meaningless the Supreme Court's admonition that an ordinance must not "effectively den[y] . . . a reasonable opportunity to open and operate an adult theater within the city." *Renton,* 475 U.S. at 53-54, 106 S.Ct. at 932.

The ordinance's 1,000-foot separation requirement between adult businesses makes this case vastly different from *Renton*, where the Supreme Court upheld an ordinance regulating the location of adult theaters. That ordinance, when applied, allowed 520 acres of " '[a]mple, accessible real estate' " for adult theater sites. *Id.* Within those areas, there was no separation requirement between adult businesses. Thus, all of the acreage was effectively open to adult theaters, and conceivably, the only limit to the number of theaters that could locate there stemmed from market forces. That ordinance did not impose the intrinsic limitation that this ordinance does. Though the City asserts that 99.5 acres are available in Whittier for locating an adult business, in fact, only a fraction of that acreage is potentially available. It can hardly be compared to the 520 acres in *Renton,* where there were no other restrictions emanating from the terms of the ordinance itself.

Two circuit courts that have analyzed ordinances imposing separation requirements between adult businesses have arrived at the same conclusion we do today. In *Alexander v. City of Minneapolis,* 698 F.2d 936 (8th Cir.1983), the ordinance in question required

that adult businesses be separated from other adult businesses and certain other uses by 500 feet. *Id.* at 937. The court found the ordinance unconstitutional on the basis that it permitted, at most, 12 possible sites for relocation. *Id.* at 938-39. This number of sites did "not supply sufficient access to the constitutionally protected adult uses in question. . . ." *Id.* at 939 n. 7. We note that the 12 sites in that case significantly outweigh the number of sites allowed under the City's ordinance in this case.

The Sixth Circuit found unconstitutional an ordinance which, when applied, apparently allowed the same range of sites as the City's ordinance. The ordinance in *CLR Corp. v. Henline,* 702 F.2d 637, 638 (6th Cir.1983) required adult businesses to be separated from schools, churches, and residences by 500 feet, and from other restricted uses by 1,000 feet. The court found that the ordinance impermissibly restricted First Amendment expression, as "the impact of the . . . ordinance is to permit two to four restricted uses in a half-mile strip of the city." *Id.* at 639.

The City has argued throughout that its ordinance is constitutional because it is modeled after the one found constitutional in *Young v. American Mini Theatres, Inc.,* 472 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).[7] This argument has been made to other courts unsuccessfully. *See CLR Corp.,* 702 F.2d at 639; *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1213 (5th Cir.1982). As the Fifth Circuit has pointed out, "merely mimicking the ordinance upheld in [*Young*] is not enough." *Id.*

[7]Unlike the ordinance at bar, however, the Detroit ordinance in *Young* imposed a 1,000-foot separation requirement between one adult theatre and any *two* other regulated uses. *Id.* 472 U.S. at 52, 96 S.Ct. at 2443. Thus, the Detroit ordinance was far less restrictive than the Whittier one.

at 1213. In *Young*, the district court had found that there were " 'myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight.' " *Young*, 427 U.S. at 71-72 n. 35, 96 S.Ct. at 2452-53 n. 35. Justice Stevens, writing for a plurality of four, stated, "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n. 35, 96 S.Ct. at 2453 n. 35.[8]

Moreover, the plurality in *Young* relied on the fact that the ordinance would " 'not affect the operation of existing establishments but only the location of new ones.' " *Id.* at 72, n. 35, 96 S.Ct. at 2453, n. 35 (quoting the district court's findings). As we have previously noted, "there is little doubt that a majority would have questioned an ordinance putting all existing theaters out of business." *Walnut Properties*, 808 F.2d at 1336.[9] Yet that is precisely the effect of Whittier's ordinance.

[8]Though only a plurality joined in the opinion, Justice Powell expressly pointed out in his concurrence that the ordinance did not involve "any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience." *Young*, 427 U.S. at 79, 96 S.Ct. at 2456 (Powell, concurring). *See also Basiardanes*, 682 F.2d at 1214 (discussing *Young*).

[9]In his concurrence, Justice Powell noted, "On the basis of the District Court's finding . . . it appears that if a sufficient market exists to support [adult theaters], the number of adult movie theaters in Detroit will remain approximately the same, free to purvey the same message." *Young*, 427 U.S. at 79, 96 S.Ct. at 2456. *See also Alexander*, 698 F.2d at 938 (discussing *Young*). A majority of the Court later distinguished an ordinance banning nude dancing from the one in *Young*, noting that the Detroit ordinance "did not affect the number of adult movie theaters that could operate in the city. . . ." *Schad v. Borough of Mt. Ephriam*, 452 U.S. 61, 71, 101 S.Ct. 2176, 2184, 68 L.Ed.2d 671 (1981).

Enforcement of the ordinance as to Walnut's theater would force the only existing adult theater in Whittier to close at its present location with no definite prospect of a place to relocate. This effect makes this case markedly different from *Young* where the Detroit ordinance applied prospectively only and did not affect existing theaters. The Eighth Circuit in *Alexander* distinguished the Minneapolis ordinance at issue there from the Detroit one in *Young* on a similar basis, noting that enforcement of the Minneapolis ordinance would force a relocation of all five adult theaters in the city and between seven and nine of the ten adult bookstores. *Alexander,* 698 F.2d at 938.

We note that there is nothing in the *Renton* opinion which indicates that the Court would uphold an ordinance which would eliminate all adult businesses in existence at the time the ordinance was passed. The Court simply was not faced with those circumstances in that case. The ordinance at issue in *Renton* was directed towards adult theaters only, and at the time the ordinance was passed no adult theaters were located in Renton. *See Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 530 (9th Cir.1984), *rev'd on other grounds,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Thus it had a prospective effect only.

We therefore affirm the district court's conclusion that the City's ordinance is unconstitutional. Not only does it effectively deny Walnut a reasonable opportunity to open and operate an adult theater within the City, but it also would force the closure of all adult businesses existing at the time the ordinance was passed.

Immunity

[5] Having found the ordinance unconstitutional, we now turn to the issue of whether City Attorney Flandrick

and City Planning Director Porter are immune from the actions they took in promoting the reenactment of the ordinance. The district court found that Porter and Flandrick were not entitled to either absolute or qualified immunity. We review that determination *de novo*. *Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1107 n. 6 (9th Cir.1987); *White by White v. Pierce County,* 797 F.2d 812, 814-15 (9th Cir.1986).

We hold that Porter and Flandrick are entitled to qualified immunity and, thus, we do not reach the issue of whether absolute immunity is appropriate under these circumstances. Government officials enjoy qualified immunity from liability under 42 U.S.C. § 1983 unless their conduct violated "*clearly established* . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) (emphasis added). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* The test is wholly objective, and we do not inquire into the actual subjective intent of the official. *Davis v. Scherer,* 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984). Thus, our inquiry is whether Walnut's First Amendment rights were clearly established so that a reasonable person would have known that the reenactment of the ordinance would amount to a constitutional violation. We hold that Walnut's rights were not so clearly established.

In rejecting Porter's and Flandrick's claim of qualified immunity, the district court found that Walnut's rights were "clearly established" by the district court's judgment in *Walnut I,* which found the original ordinance

unconstitutional; Walnut makes this same argument on appeal. The *Walnut 1* decision did not clearly establish the law with respect to the issues raised in *Walnut 2* for several reasons. The district court found the first ordinance unconstitutional because the City failed to prove that the 1,000-foot separation requirement between a church and an adult theater "further[ed] a compelling government interest" and "because a motivating factor [behind the requirement] was to restrict the exercise of First Amendment rights. . . . "[10] The defendants attempted to cure the constitutional defects of the first ordinance by conducting a new study to demonstrate that the ordinance furthered a compelling interest. Moreover, the district court's finding of improper motive with respect to the first ordinance could not necessarily apply to the second ordinance because the latter was passed in light of the new study. Thus, the district court's opinion in *Walnut 1* could not have "clearly established" that the second ordinance would violate Walnut's rights. We note, however, that the two ordinances were identical in terms of their allowance of alternative sites. But because the district court in its original decision in *Walnut 1* did not rest its holding on the inadequacy of available alternatives, the decision did not clearly establish the law in that respect. In sum, the district court erred when it held that *Walnut 1* "clearly established" rights so as to defeat immunity.

We therefore must disregard the original decision in *Walnut 1* when we assess the state of the law at the time the City passed the second ordinance. Absent binding precedent, we look at "all available decisional

[10]In its first decision, the district court did not rest its holding, in part, on the lack of alternative sites. This circuit, however, affirmed the district court's finding of unconstitutionality partially on that basis.

law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established. . . . An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that had already considered the issue." *Ward v. County of San Diego,* 791 F.2d 1329, 1332 (9th Cir.1986), *cert. denied,* —— U.S. ——, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987). *See also Capoeman v. Reed,* 754 F.2d 1512, 1514-15 (9th Cir.1985) (as amended). We must, therefore, ask whether other decisions had "clearly established" that the second ordinance passed by the City was unconstitutional.

Surveying the cases that existed in 1984, we note that several courts elucidated broad principles of First Amendment law, but few applied those principles to circumstances similar to those at hand. We recognize that the constitutionality of zoning ordinances frequently depend upon the factual situations involved; a 1,000-foot separation requirement between churches and adult businesses may be found constitutional in one instance and unconstitutional in the next, depending on the evidence supporting the need for such a provision, the motivations propelling its enactment, and the extent to which the restriction allows alternative locations for communicating the protected expression.

We begin our analysis by pointing out that our inquiry for the purposes of qualified immunity extends beyond the scope of our discussion relating to the constitutionality of the ordinance. We found the ordinance unconstitutional on the basis that it failed to leave open adequate alternatives of communication. We thus did not need to address whether it was unconstitutional on the other grounds found by the district court—those relating to motive and to the sufficiency of the evidence

supporting the ordinance. However, in order to find that the defendants are entitled to qualified immunity, we must venture into those areas to a limited extent. Our task is to determine whether, *assuming* the ordinance is unconstitutional on those other two grounds as well, the law was so clearly established at the time that the City should have known that passing the ordinance violated Walnut's First Amendment rights.

We have no difficulty concluding that the law as of 1984 failed to clearly establish the role of motive in constitutional analysis. The issue had surfaced primarily in this circuit, but the cases which discussed motive in some depth did so only in the context of reviewing a grant of summary judgment or a denial of a preliminary injunction. In *Ebel v. City of Corona,* 698 F.2d 390, 393 (9th Cir.1983), we determined that there existed sufficient evidence of an improper motive on behalf of a city that enacted an adult ordinance, to present "fair ground for litigation." And in *Tovar v. Billmeyer,* 721 F.2d 1260, 1265 (9th Cir.1983), *cert. denied,* 469 U.S. 872, 105 S.Ct. 223, 83 L.Ed.2d 152 (1984), we found that a genuine issue of material fact existed as to whether zoning decisions affecting adult businesses were improperly motivated. *See also Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1348 (9th Cir.1983) (as amended). In neither case were we in the position to set forth definitively the role that motivation would play in determining whether zoning ordinances were unconstitutional.

Similarly, the law as of mid-1984 had not clearly established what constituted a legitimate need for an adult ordinance or even whether a legitimate need was required. At least one case held that an ordinance was constitutional even if the city did not set forth any factual basis for its ordinance. *See Strand Property Corp. v.*

Municipal Court, 148 Cal.App.3d 882, 887, 200 Cal.Rptr. 47 (1983) (as modified). Other courts held the opposite, finding that the ordinance could be sustained only if there existed some factual basis for the purported governmental interest served by the ordinance. *See, e.g., North Street Book Shoppe v. Village of Endicott,* 582 F.Supp. 1428, 1434-35 (N.D.N.Y.1984); *E & B Enterprises v. City of University Park,* 449 F.Supp. 695, 696-97 (N.D.Tex.1977); and *Keego Harbor Co. v. City of Keego Harbor,* 657 F.2d 94, 98-99 (6th Cir.1981). But none of those cases indicated sufficiently clearly what factors justified an ordinance regulating adult businesses. The City passed its ordinance on the basis of a second study, thus offering at least some factual basis for its ordinance. At the time, there were no clear guidelines indicating whether its study contained sufficiently probative evidence to support a finding that the ordinance was constitutional. Thus, even if the ordinance is unconstitutional for lack of sufficient reasons supported by adequate evidence, we can hardly say that the law clearly established such a defect at the time the second ordinance was passed.

Finally, we must determine whether the law clearly established that the ordinance left open insufficient alternative avenues of communication. By the time the City passed the second ordinance, several courts had held that various ordinances impermissibly restricted First Amendment rights by failing to provide adequate alternative locations for adult businesses. *See, e.g., North Street Book Shoppe,* 582 F.Supp. at 1432; *CLR Corp.,* 702 F.2d at 639; *Bayside Enterprises, Inc. v. Carson,* 450 F.Supp. 696, 703 (M.D.Fla.1978); *E & B Enterprises,* 449 F.Supp. at 697; *Alexander,* 698 F.2d at 939; and *Basiardanes,* 682 F.2d at 1214. However, the decisions in those cases, by focusing on the availability

of alternative sites, necessarily turned upon the particular geographical characteristics of the city involved. To extract from those few cases clear principles of constitutional law would be to impose an altogether unrealistic burden on officials who are held only to the reasonable person standard.[11] As we recognized in *Ward*, when evaluating whether the law was clearly established at the time officials acted, we do not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians. A reasonable person standard adheres at all times." *Ward*, 791 F.2d at 1332.

Moreover, even if the "relevant decisional law at the time of the incident favors [plaintiff's] position," it still may be unclear whether the defendants "should be charged with knowledge of 'clearly established' law." *Capoeman*, 754 F.2d at 1514, 1515. In *Capoeman*, we refrained from holding that the pertinent law was clearly established even though there were three cases from other circuits and three district court cases that established the right in question. *See id.* at 1514. We stated that, where there are "relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered

[11]Of course, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . ." *Anderson v. Creighton*, — — U.S. —, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The fact-specific nature of First Amendment analysis does not automatically shield public officials with qualified immunity for First Amendment violations whenever the facts are in any degree different. *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1408 (9th Cir.1988).

the issue. To make the determination, we examine the legal analysis employed by those courts and compare it to the analysis being used at that time by the Ninth Circuit in related but factually different situations." *Id.* at 1515. We do not mean to suggest that three out-of-circuit cases or even one may not be enough to show that the law is clearly established. Rather, we reaffirm only that in such circumstances we may be required to evaluate the prospects that the Supreme Court or our court will agree.

Here, there were virtually no cases in the Ninth Circuit discussing the standard to be applied in assessing the adequacy of alternative locations for adult businesses. In *Playtime Theaters, Inc.*, 784 F.2d at 527, decided months after the City passed the second ordinance, we noted in a footnote that this circuit had not previously considered the question. *Id.* at 534 n. 11. While in other types of cases the absence of prior Ninth Circuit analysis of the relevant issues might not preclude a finding that the law was clearly established, given all of the circumstances of this case, we cannot reach that result here. Without any indication of what analysis this circuit would employ, the defendants could not be expected to extrapolate a clear rule from the variety of circumstances faced by other courts. We hold that the law in existence at the time of the defendants' actions failed to establish clearly that the second ordinance was unconstitutional. The defendants are therefore entitled to qualified immunity.

CONCLUSION

We affirm the district court's finding that the ordinance is unconstitutional on the basis that it fails to allow adequate alternative locations for Walnut's theater. We also affirm the district court's decision not

to abstain. However, we reverse the district court's denial of qualified immunity, because we hold that the law did not clearly establish that the second ordinance was unconstitutional at the time it was enacted. We affirm all awards of attorneys' fees in both actions.

AFFIRMED IN PART, AND REVERSED IN PART.

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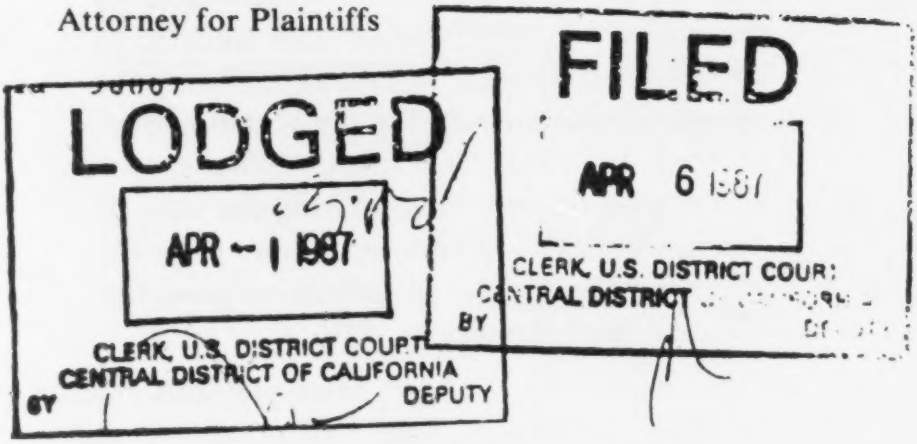
Attorney for Plaintiffs



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation, et al., Plaintiffs, v. CITY OF WHITTIER, A Charter City, et al., Defendants.	CASE NO. 81-2262-R ORDER FOR FEES (~~PROPOSED~~) DATE: April 6, 1987 TIME: 10:00 A.M. PLACE: Judge Real's Courtroom

On January 12, 1987, the court entered Findings of Fact and Conclusions of Law stating in relevant part:

"Plaintiffs, as prevailing parties in this action, are entitled to a reasonable attorneys fee

pursuant to 42 U.S.C. § 1988. On May 21, 1984, the court awarded plaintiffs fees in the sum of $39,035 for services rendered in this court. The court reinstates that award, with interest thereon from May 21, 1984. On January 21, 1986, the court awarded plaintiffs the sum of $25,478.00 for services rendered in the court of appeals in connection with the appeal which culminated in the Memorandum of May 14, 1985. The court reinstates that award with interest thereon from the date of January 21, 1986. In addition thereto plaintiffs are entitled to fees for all services rendered in this case since January 21, 1986.

On March 16, 1987, the court heard plaintiffs' motion for fees from January 21, 1986, and ordered plaintiffs to file better documentation of the services rendered since January 21, 1986. Plaintiffs' counsel has filed a supplemental affidavit in accordance with the court's order. The court finds that from May 9, 1986, to and including January 12, 1987, plaintiffs are entitled to compensation for 72 hours of work at a rate of $230.00 an hour for a total of $16,560. In addition thereto, plaintiffs are entitled to additional compensation as follows:

Court Appearance, March 16, 1987 2 hours × $230.00 =	$460.00
Preparation of Stanley Fleishman's Supplemental Declaration 4 hours × $230.00 =	$920.00
Court Appearance, April 6, 1987 2 hours × $230.00 =	$460.00
TOTAL	$1,840.00

The court now Orders the defendants to pay forthwith to Stanley Fleishman, attorney for plaintiffs, fees as follows:

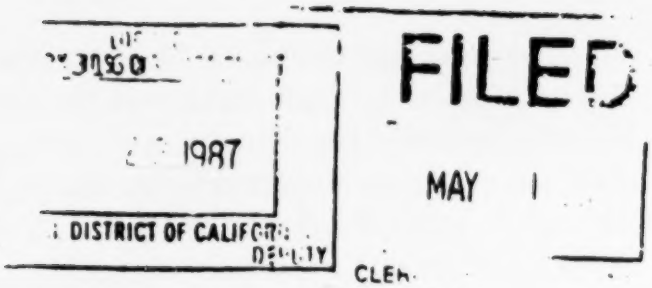
The sum of $39,035.00 with interest from June 22, 1984, in accordance with 28 U.S.C. § 1961, and

The sum of $25,478.00 with interest from January 21, 1986, in accordance with 28 U.S.C. § 1961, and

The sum of $18,400.00 for services rendered since January 21, 1986.

4-6-87

MANUEL L. REAL
UNITED STATES DISTRICT COURT JUDGE



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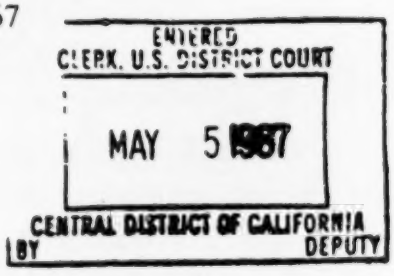

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation, et al., Plaintiffs, v. CITY OF WHITTIER, a Charter City, et al., Defendants.	CASE NO. 81-2262-R JUDGMENT

The court having received and spread the mandate of the United States Court of Appeals for the Ninth Circuit, and having signed and entered its Findings of Fact and Conclusions of Law now makes the following Judgment:

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

APPENDIX C

1. The portion of Ordinance No. 2257 which prohibits the location of an adult theater within 1,000 feet of a church violates the provisions of the First and Fourteenth Amendments, and is declared invalid as applied to plaintiff's theater located at 7028 Greenleaf Avenue, Whittier, California.

2. Defendants, their agents, servants, employees and representatives are enjoined from initiating any criminal proceedings against plaintiffs, their employees, representatives or agents, based upon the operation of their theater located at 7026 Greenleaf Avenue, Whittier, California, because it is within 1,000 feet of a church.

3. Defendants and their agents, servants, representatives and employees are enjoined from initiating any injunction proceedings against plaintiffs, their agents, servants, representatives or employees based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California because the theater is within 1,000 feet of a church.

4. Defendants shall pay plaintiff's attorneys' fees and costs.

DATED: MAY 1 1987

MANUEL L. REAL

MANUEL L. REAL, Chief
United States District Judge

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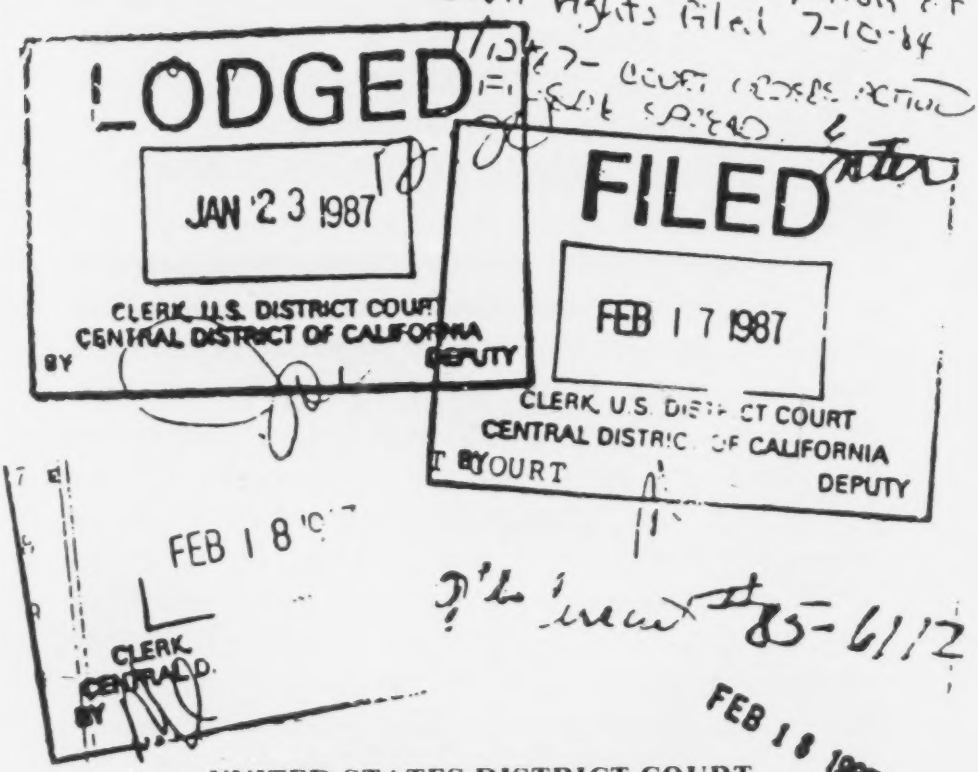
Attorney for Plaintiff

Complaint for violation of civil rights filed 7-10-84



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation, Plaintiffs,-Appellee v. CITY OF WHITTIER, a Charter City, et al., Defendants-Appellants.	CASE NO. 84-5067-R ORDER FOLLOWING REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 9, 1986 (UNPUBLISHED)

Appendix D

BACKGROUND

1. Walnut Properties, Inc. (Walnut) brought this action seeking (1) a declaration that City of Whittier Ordinance No. 2327 was unconstitutional insofar as it prohibits an adult theater from operating within 1,000 feet of a church; (2) an injunction prohibiting criminal or civil proceedings against Walnut's theater because it is operating within 1,000 feet of a church, and (3) compensatory and punitive damages against the City's Planning Director, Elvin Porter and the City's attorney, J. Robert Flandrick, for denying Walnut its property rights without due process and denying it freedom of speech.

2. Walnut filed a motion for partial summary judgment declaring the ordinance unconstitutional insofar as it prohibited an adult theater from operating within 1,000 feet of a church. Porter and Flandrick filed a cross-motion for summary judgment or, in the alternative, for partial summary judgment alleging that (1) the ordinance is constitutional, (2) Porter and Flandrick are immune from all liability, and (3) Walnut is not entitled to recover damages even if defendants were subject to liability. This court granted Walnut's motion for partial summary judgment, and denied the motion of defendants Porter and Flandrick. The court set forth its reasons for so ruling in its Order filed September 13, 1985 and entered November 15, 1985. The defendants appealed.

3. In ruling as it did this court relied upon its earlier decision in Walnut Properties, Inc. v. City of Whittier, No. 81-2262-R (Walnut I) which the Ninth Circuit affirmed by memorandum. Walnut Proerties, Inc. v. City of Whittier, Nos. 84-5755, 84-6087 (9th Cir. May 14, 1985). Walnut I was vacated by the Supreme Court and remanded to the Ninth Circuit for further consideration in light of City of Renton v. Playtime Theatres, Inc.,

106 S.Ct. 925 (1986). On October 21, 1986 the Ninth Circuit remanded Walnut I to this court to make new findings and conclusions in light of Renton and in light of the Ninth Circuit's interpretation of Renton. Walnut Properties, Inc. v. City of Whittier, 802 F.2d 1170 (9th Cir. 1986).

4. The parties briefed this court on the issues involved in Walnut I in light of Renton, and the Ninth Circuit's interpretation of Renton, and each party submitted proposed Findings of Fact and Conclusions of Law. On January 12, 1987, the court adopted Plaintiff's Proposed Findings and Conclusions, holding that the provision of the City's ordinance prohibiting an adult theater from operating within 1,000 feet of a church violated the First and Fourteenth Amendments to the United States Constitution.

THE REMAND ORDER OF DECEMBER 9, 1986

5. On December 9, 1986, the Ninth Circuit filed an order vacating the judgment in this case and remanding the case to this court for further proceedings consistent with Renton and this court's interpretation of Renton in Walnut I, 802 F.2d 1170 (9th Cir. 1986).

ORDER

6. The court has considered City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1983), Walnut Properties, Inc. v. City of Whittier, 802 F.2d 1170 (9th Cir. 1986), as amended January 20, 1987, this court's Findings of Fact and Conclusions of Law in Walnut I filed January 12, 1987, and this court's Order in the case at bar entered November 15, 1985, and ORDERS:

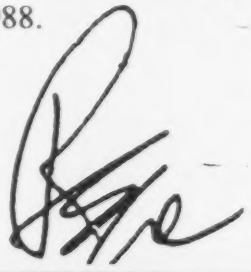
A. Plaintiff is entitled to partial summary judgment declaring that City of Whittier Ordinance No. 2327, on its face and as applied to plaintiff, is unconstitutional, violating the First and Fourteenth Amendments to the

United States Constitution, insofar as it prohibits an adult motion picture theater from operating within 1,000 feet of a church. The court so declares.

B. Defendants' motion for summary judgment or alternatively, for partial summary judgment is denied in all respects.

C. Plaintiff is entitled to reasonable attorneys' fees pursuant to Title 42, U.S.C. § 1988.

2-17-87



MANUEL L. REAL, JUDGE
UNITED STATES DISTRICT COURT

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALNUT PROPERTIES, INC., a California Corporation, et al., Plaintiffs-Appellees, vs. CITY OF WHITTIER, a Charter City, et al., Defendants-Appellants	Nos. 845755, 84-6087 DC# NO. CV 81-2262-R AMENDED ORDER

Before: BOOCHEVER and BEEZER, Ciricuit Judges, and SOLOMON,* District Judge

It is hereby ordered that costs shall be awarded to defendants-appellants. Judge Boochever would order that each party should bear its own costs.

* Honorable Gus J. Solomon, Senior U.S. District Judge, District of Oregon, sitting by designation.

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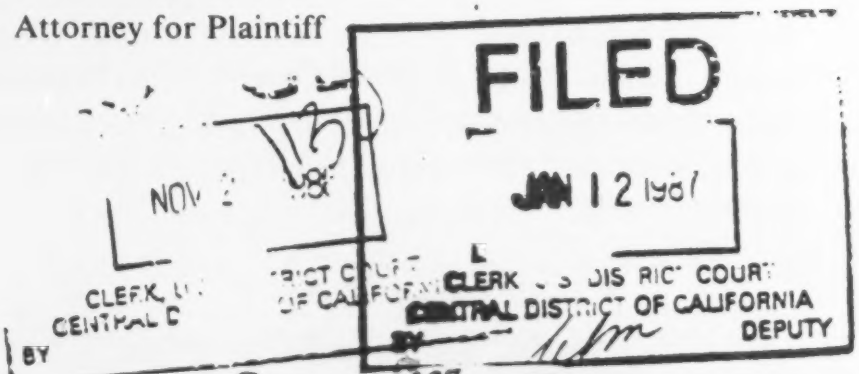

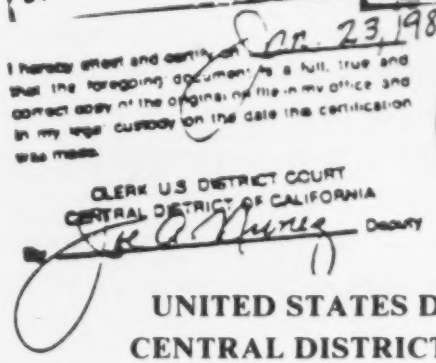

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation, et al., Plaintiffs, v. CITY OF WHITTIER, a Charter City, et al., Defendants.	CASE NO. 81-2262-R FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING REMAND

On October 21, 1986, the United States Court of Appeals for the Ninth Circuit remanded the case to this

court to make new findings and conclusions in light of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986), and the opinion of the Ninth Circuit filed October 21, 1986.

This matter duly came on for hearing on December 15, 1986, before the Honorable Manuel L. Real, Chief Judge, United States District Court for the Central District of California and the court being fully informed now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief as follows:

A. Plaintiffs seek a judicial declaration that the City of Whittier's "Adult Business Ordinance," as it applies to plaintiffs' motion picture theater, is unconstitutional on its face, and as applied, violating the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek injunctive relief to prevent the defendants from enforcing the said ordinance against plaintiffs; and

B. Defendants by their counter-claims seek a judicial declaration that the ordinance is valid and subsisting.

2. The plaintiffs herein are Walnut Properties, Inc., a California corporation ("Walnut"), and Vincent Miranda, its President.

3. The defendants are City of Whittier, a Charter City; M.D. Klaxaton, R. L. Henderson, L.A. Strong, Gene Chandler, V.A. Lopez, as members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and John Robert Flandrick as City Attorney of the City of Whittier.

4. Walnut is the owner of certain real property located at 7028 Greenleaf Avenue, Whittier, California, where it operates an adult motion picture theater.

5. Walnut's exhibition of adult motion picture films, is protected by the First and Fourteenth Amendments to the Federal Consititution, so long as the motion picture films are not obscene.

6. During May 1977, Walnut commenced to operate upon the Property a motion picture theater, exhibiting "Adult" films, as part of its chain of "Pussycat" theaters.

7. On June 22, 1977, the City enacted as an "urgency measure" Ordinance No. 2116 which had the purpose and effect of imposing certain limitations on "adult businesses."

8. On October 11, 1977, the City enacted as an "urgency measure" Ordinance No. 2121 reenacting, and readopting the terms and provisions of Ordinance No. 2116. On December 7, 1977, the City enacted as an "emergency measure" Ordinance No. 2128 which essentially continued in effect the provisions of Ordinance No. 2116, as it related to "adult businesses."

9. The emergency ordinances culminated in the enactment of Ordinance No. 2138 (hereinafter "first ordinance") on November 7, 1978. Except for its proximity to a church, Walnut's theater met all of the locational requirements of this ordinance. The theater is located in the C-2 zone; is not within 500 feet of any lot classified in any of the R zones; is not within 1,000 feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; is not within 1,000 feet of any lot upon which there is located a city-owned, operated and maintained public park; is not within 1,000 feet of any

lot on which there is located another adult business; and is not within 500 feet of any lot on which there is located a business witha type-40-, 42-, 80-, and 61-on-sale alcohol beverage license.

10. Walnut Theater is the only theater in Whittier exhibiting adult films, and it is within 1,000 feet of a church. By reason of its proximity to a church, the City filed an action against Walnut pursuant to the first ordinance seeking an injunction restraining Walnut from operating its theater, as an adult theater, because it was within 1,00 feet of a church. City of Whittier v. Walnut Properties, Inc., et al., LASC No. SEC 29232.

11. The case was heard by the Honorable Vincent Dalsimer, Judge, Los Angeles Superior Court. On March 24, 1981, Judge Dalsimer filed Findings of Fact and Conclusions of Law holding that the first ordinance was unconstitutional on its face. He stated that the portion of the ordinance prohibiting an adult theater from locating within 500 feet of a "public facility which is utilized by minors," has the legal effect of prohibiting the location of any adult business on any location within the City. Judge Dalsimer concluded:

> The absolute prohibition of an otherwise lawful business constitutes a violation of the state and Federal Constitutions and such ordinance is found to be void as applied to the defendant Walnut herein. Walnut is entitled to a judgment dismissing the complaint against it.

12. On the same day Judge Dalsimer signed his Findings of Fact and Conclusions of Law the City passed and approved as an emergency ordinance, Ordinance No. 2257, the ordinance involved in this case. Basically, this second ordinance is the same as the first ordinance, except that it eliminates the prohibition of operating

an adult theater within 500 feet of a "public facility which is utilized by minors." This second ordinance, like the first ordinance, prohibits an adult theater from operating within 1,000 feet of a church.

13. The City filed a Notice of Appeal on April 29, 1981 from Judge Dalsimer's ruling holding the first ordinance unconstitutional.

14. On May 7, 1981, Walnut filed its complaint in this case alleging that unless restrained, the defendants would initiate criminal proceedings against plaintiffs for operating an adult theater in violation of Ordinance No. 2257, and would seek injunctive relief requiring plaintiffs to discontinue exhibiting constitutionally protected film dealing with sex in their theater.

15. This court conducted a full trial prior to the time the appellate proceedings were concluded in the state court. A chronology of the events in the state appellate courts follows:

A. On February 1, 1983, the state Court of Appeal reversed the judgment of the Superior Court, holding that the trial court should have based its decision on the second ordinance, not on the first ordinance under which the complaint was filed. The Court of Appeal then held the second ordinance constitutional.

B. On February 15, 1983, in response to plaintiffs' Petition for Rehearing, the Court of Appeal modified its opinion and judgment and ordered the Superior Court to hold a hearing to determine whether plaintiffs' theater was an adult theater within the meaning of the ordinance. The court then denied the Petition for Rehearing.

C. On May 19, 1983, in response to plaintiffs' Petition for Hearing, the California Supreme Court granted the Petition and retransferred the matter to the Court of

Appeal with directions to reconsider on remand its order in certain enumerated respects.

D. On December 8, 1983, the Court of Appeal rendered its second decision, stating in relevant part:

> No evidence having been introduced on the crucial issue of the availability of other areas in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue."

The Court of Appeals reversed the judgment of the Superior Court, stating:

> On remand, the trial court shall make the necessary rulings on proffered evidence as to the status of the theater as an 'adult theater' and as to the availability of alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

E. On February 2, 1984, the California Supreme Court denied plaintiffs' petition for hearing.

16. On February 13, 1984, this court held a hearing to consider events which occurred after the completion of the trial herein. After considering the events occurring in the state court and two recent decisions of the United States Court of Appeals for the Ninth Circuit (Tovar, et al. v. Billmeyer, 721 F.2d 1260 (9th Cir. 1983) and Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983)) the court concluded that there was no reason why it should not render its decision herein.

17. In its Order of October 21, 1986, the Court of Appeals reinstated the portion of its Memorandum Opinion of May 14, 1985, "affirming this court's decision not to apply the doctrine of res judicata." Slip Op. 2,

n.1. The Ninth Circuit remanded so that this court could make new findings and conclusions in light of Renton, and the Ninth Circuit's October 21, 1986 Opinion.

MOTIVATION

18. The City enacted the provision of its ordinance prohibiting an adult theater from operating within 1,000 feet of a church for the predominant purpose of suppressing Walnut's First Amendment rights. The provision was enacted primarily because of the content of the adult films exhibited at Walnut's theater.

The City was concerned with the content of the films exhibited at Walnut's theater from the very beginning.

The City's first emergency ordinance was enacted shortly after Walnut began to exhibit adult films. At that time, there was a lot of "agitation" by some groups in Whiittier who didn't want to have any adult theater in the City. They were upset when Walnut bought the Wardman theater. RT 153. A delegation consisting of a Whittier concilwoman, a member of a censorship group called Citizens for Decency Through Law, and the executive director of the Whittier Uptown Association visited Walnut's President, Mr. Miranda, shortly after the purchase of the theater, and suggested that Walnut discontinue exhibiting adult films, and instead exhibit "family films." RT 206-207. Mr. Miranda told the delegation that the prior owner of the theater had tried that policy and failed because the only films that made any money were "action type" films, and they created "a lot of violence in the theater." RT 207. Mr. Miranda testified that the delegation asked him if Walnut would sell or lease the theater to a group prepared to exhibit "family" films. He stated that he would, and gave the delegation a proposition, which they turned down. The ordinance was then enacted. RT 207.

At trial, Elvin Porter, Director of Planning of the City of Whittier, sought to justify the 1,000 feet separation, stating that "most churches are against the display of the human body . . . for anyone that wants to view the human body and acts," and that the proximity of an adult theater to a church created a "morals" conflict. Neither ground is a proper zoning consideration, where freedom of expression is involved.

The City's concern with the content of Walnut's films was clearly revealed by the City's conduct after the trial of this case was concluded.

On March 1, 1984—when the City knew that judgment was going to be entered against it, Mr. Porter wrote at least five identical letters to church groups reading as follows:

> As you may be aware, in 1978, the City of Whittier adopted an Ordinance regulating the establishing of adult businesses. The Ordinance set forth minimum distances between adult businesses and certain other uses. One of those other uses were churches, from which adult businesses were required to be located at least 1,000 feet. The distance was established because of the obvious inconsistency between the philosophies of the two activities; potential adverse influences on young people; and possible risks to women and children in the vicinity of such facilities.
>
> Over the past five years, the City has been involved in litigation against the Pussycat Theater in Uptown Whittier which is less than 1,000 feet from several churches. Recently, a Federal judge found that the 1,000 foot separation was without a factual basis and

struck the requirement from the Ordinance.

We are now attempting to establish a factual basis for the inclusion of the 1,000 foot separation and are soliciting the help of the churches in developing these facts. We are requesting your comments on any experiences you or your members may have had in regards to the theater or other adult businesses to support a finding that the two uses are incompatible land uses when in close proximity to one another.

We appreciate your prompt response to this matter and if you have any questions, please contact Mr. Burnham of my office. (Emphasis added).

One response to Porter's letter was from the Associate Minister of the First Christian Church dated March 6, 1984. It reads in relevant part:

> "I am writing to let you know that our church is in agreement with your attempt to prove the incompatibility of land uses between our church and the Pussycat Theater.

Another response was from the Senior Minister of First Baptist Church. It reads in relevant part:

> I have received your letter of March 1st concerning the City's ordinance relating to the establishing of adult businesses. The City is involved in litigation against the Pussycat Theater in uptown Whittier, seeking to close this establishment because of regulations covered in the ordinance. . . . After considerable . . . discussion, the Board voted unanimous agreement with the action of the City of Whittier in seeking to close the Pussycat

> Theater in uptown Whittier. We feel that this "adult business" is completely incompatible to our church and its attempt to influence Whittier to continue to be a community of upright moral citizens.

The finding that the predominant purpose of the disputed provision of the ordinance was to suppress plaintiffs' First Amendment rights, is bolstered by the fact that the City failed to give any reason for the provision other than the "morals" conflict, flowing from the content of the adult films to justify the church-adult theater separation.

GOVERNMENTAL INTEREST

19. Prior to enacting its ordinance the city prepared a Report which found that there was a need to prevent a concentration of adult businesses. The Report did not reveal any justification for prohibiting a single adult theater within 1,000 feet of a church. The Report noted that a representative of the Whittier Presbyterian Church, though aware of the adult theater's proximity, said there was no evidence of direct impact on the church. The Report stated that the City's ordinance was modeled after the Detroit ordinance involved in Young v. American Mini Theaters, 427 U.S. 50 (1976). At trial, however, the City was totally unable to point to any study or experience dealing with the effect of a single adult theater on a nearby church.

At trial, Mr. Porter testified that the City had no evidence to support a finding that a church would suffer any adverse effect because it was located within 1,000 feet of an adult theater. He testified that there was nothing shown that would be a specific problem between plaintiff's theater and a church. He also testified that the "operational characteristics" of an adult theater are

similar to those of other kinds of theaters, and that the only difference between them is that an adult theater limits admission to adults, and shows more sexual material. RT 99-100.

The City failed to meet its burden of proving that its decision to separate a church and an adult theater by 1,000 feet furthers a substantial government interest. Indeed, there is no rational zoning basis for keeping an adult theater 1,000 feet from a church. The City has not established that its legitimate zoning interests could not be met by restrictions that are less intrusive on protected forms of expression.

There is simply nothing in the record revealing any rational basis for believing that plaintiff's theater, located within 1,000 feet of a church, poses any special threat to the City's legitimate interest. It appears that the City acted on mere negative attitudes or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.

AVAILABILITY OF OTHER SITES

20. The provision of the ordinance requiring a separation of 1,000 feet between a church and an adult theater makes it impossible to operate an adult theater in the central district of Whittier. Since Walnut has the only theater in the City exhibiting adult films its elimination would leave the City without any theater showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the City.

The record demonstrates conclusively that the City's ordinance substantially restricts First Amendment interest, and was intended to do so. The City's Report states that it was "quite obvious" that requiring a 500 feet separation from residential areas "will have the effect of making all of existing adult businesses, with the

exception of [Walnut's] theater uptown, non-conforming uses, subject to abatement." (emphasis added) By prohibiting Walnut from operating its theater uptown, because it is within 1,000 feet of a church, the ordinance then has the effect of making all existing adult businesses, including Walnut's theater subject to abatement.

Mr. Metcalfe testified that in the entire City of Whittier there are only twelve acres where an adult business could locate.[1] TR. 164. Mr. Metcalfe and Mr. Porter disagreed as to the availability of some locations. In his disagreement with Mr. Porter, Mr. Metcalfe testified that under the ordinance an adult theater could not locate within 1,000 feet of Nellie's School for Boys, RT 166, the Palm View Assembly of God Church, TR 167 or the Presbyterian Intercommunity Hospital, RT 171. Those exclusions eliminated the bulk of the industrial properties Mr. Porter testified were available. RT 172. Mr. Metcalfe testified that both the Presbyterian Hospital and Nellie's School for Boys had a chapel and were therefore "churches" within the meaning of the ordinance. He further testified that Nellie's School for Boys, which is a reformatory, was a school within the meaning of the ordinance. The court questions whether Mr. Metcalfe was correct in so designating these institutions. Nevertheless, it makes no sense to force Walnut to move its theater from downtown because it is within 1,000 feet of a church, and have it locate within 1,000 feet of the Presbyterian Hospital or Nellie's School for Boys.

Moreover, the ordinance requires all adult businesses to obtain a conditional use permit, thus putting the burden on an applicant to demonstrate that there is a

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[1] Adult businesses covered by the ordinance include adult theaters, massage parlors, adult bookstores, and model studios.

need to establish an adult business at the particular location. Walnut's expert, Mr. Metcalfe, testified that the severe locational requirements of Whittier's ordinance, plus the conditional use permit, make it impossible to establish an adult theater in Whittier, because there was no way one could persuade the Whittier authorities that there exists a "demonstrated need" for an adult theater in the City. RT 176-178. Mr. Porter conceded that an applicant for a conditional use permit must prove that there is a "demonstrated need" for the adult theater requested, and that the public interest, convenience and necessity "require" that such adult theater be permitted at the requested location RT 43-44. It is unlikely that the City would grant a conditional use permit to operate an adult theater within 1,000 feet of the Presbyterian Hospital or the school.

Mr. Porter and Mr. Metcalfe also disagreed as to whether an adult business could locate within the Whitwood Shopping Center. Mr. Metcalfe testified that according to the records of the Assessor, every parcel in the Whitwood Shopping Center was owned by the same owner, and that it was a single lot, and therefore the shopping center was not available for an adult business under the ordinance. RT 174. Even if Whitwood Shopping Center is deemed to consist of separate lots, as Mr. Porter testified, it is unlikely that the City would grant a conditional use permit to operate an adult business in the shopping center. While theoretically there may be space there which is more than 500 feet from a residence, there is no space where it is less than 1,000 feet from a residence. There is no logic in forcing the removal of Walnut's theater from the downtown area because it is within 1,000 feet of a church, and permitting its relocation in the Whitwood Shopping Center, where it would be within 1,000 feet of a residence.

Mr. Metcalfe also testified that areas Mr. Porter said were available for an adult business, were in fact not available because the lots would have to be first subdivided before an adult business could locate in said area.

The court basically accepts the testimony of Mr. Metcalfe and finds that there is only approximately twelve acres in Whittier where an adult business might locate consistent with the ordinance. The effect of the ordinance is to substantially restrict Walnut's opportunity to operate an adult theater in the City. If, for example, an adult bookstore, or massage parlor were to open within the 12 acres, Walnut would be precluded from operating, because of the prohibition against the concentration of adult businesses. In short, the ordinance denies Walnut a reasonable opportunity to exhibit constitutionally protected films.

The operation of the ordinance is exacerbated by the fact that it does not contain a grandfather clause, since the ordinance's abatement period is 120 days. Aside from Walnut's theater, there is no adult business in Whittier. While the City asserts that Walnut could operate an adult theater other than where it is now located, this is sheer pretext. The purpose and effect of the ordinance, as it applies to Walnut's theater, is to greatly restrict lawful speech in violation of the First and Fourteenth Amendments.

ATTORNEYS' FEES

21. The court has previously made fee awards for litigation in this court, and for the appeal that resulted in the memorandum decision of May 14, 1985. Plaintiff is the prevailing party herein, and entitled to fees for all services performed subsequent to January 21, 1986.

CONCLUSIONS OF LAW

1. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3)(4), 2201, 2202, and pursuant to 42 U.S.C. § 1983.

2. Res judicata does not apply to this case. Walnut Properties Inc., et al. v. City of Whittier, et al., ___ F.2d ___ (9th Cir. Oct. 21, 1986), Slip Op. 2, n.1.

3. The provision of the City's ordinance prohibiting an adult theater from operating within 1,000 feet of a church was enacted for the predominant purpose of suppressing Walnut Properties' First Amendment rights, and is invalid as applied to plaintiff. Walnut Properties, supra, Slip Op. 7. The provision was enacted to restrain speech on the basis of the content of the adult films exhibited at Walnut's theater. In City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925, 928 the Court stated:

> This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See Carey v. Brown, 447 U.S. 455, 462-463, and n.7, 100 S.Ct. 2286, 2291, and n.7 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 95, 98-99, 92 S.Ct. 2286, 2289, 2291, 2292 (1972).

The provision of the ordinance is therefore presumptively violate of the First Amendment, and the City has failed to overcome that presumption.

4. The provision of the ordinance prohibiting an adult theater from locating within 1,000 feet of a church is unconstitutional as applied to Walnut because it does not further a substantial government interest and because the City's restriction of plaintiff's First Amendment

freedom is "greater than is essential to the furtherance" of the City's asserted interests. Walnut, supra at 8-9; see Young v. American Mini Theatres, Inc., 427 U.S. 50, 80, 96 S.Ct. 9440 (1976). The City failed to advance even a rational basis for the church-adult theater separation. Moreover, the City's interest would not be advanced by requiring Walnut to move its theater from the downtown area, because it is within 1,000 feet of a church, to a location where it would be within 1,000 feet of a residence, a hospital, or a boys reformatory.

5. The provision of the ordinance prohibiting an adult theater from operating within 1,000 feet of a church is unconstitutional, violating the First Amendment, because it denies Walnut a reasonable opportunity to operate its adult theater within the City. Renton, supra, 106 S.Ct. at 932; Walnut, supra, Slip Op. at 12-13; see American Mini Theatres, supra, 427 U.S. at 71-72 n.35.

6. The ordinance applies to Walnut because its theater is within 1,000 feet of a church. By invalidating the provision of the ordinance applicable to Walnut, plaintiffs will receive all the relief they need.

7. Plaintiffs are entitled to a judgment declaring that the ordinance is unconstitutional insofar as it prohibits an adult theater from operating within 1,000 feet of a church. Plaintiffs are also entitled to an injunction restraining defendants from initiating any criminal proceedings against plaintiffs or their employees, or from initiating any injunctive proceedings against plaintiffs or their employees based upon the operation of plaintiffs' theater within 1,000 feet of a church.

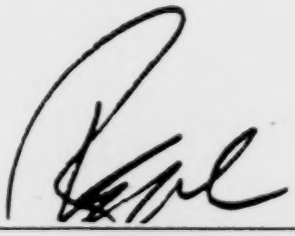
8. Plaintiffs, as the prevailing parties in this action, are entitled to a reasonable attorneys fee pursuant to 42 U.S.C. § 1988. On May 21, 1984, the court awarded plaintiffs fees in the sum of $39,035 for services rendered

in this court. The court reinstates that award, with interest thereon from May 21, 1984. On January 21, 1986, the court awarded plaintiffs the sum of $25,478.00 for services rendered in the court of appeals in connection with the appeal which culminated in the Memorandum of May 14, 1985. The court reinstates that award with interest thereon from the date of January 21, 1986. In addition thereto plaintiffs are entitled to fees for all services rendered in this case since January 21, 1986.

9. Any Finding of Fact which is more appropriately a Conclusion of Law and any Conclusion of Law which is more appropriately a Finding of Fact shall be so deemed.

Let judgment enter accordingly.

DATED: 1/12/87



MANUEL L. REAL, Chief
United States District Judge

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALNUT PROPERTIES, INC., a California corporation, Plaintiff-Appellee, v. CITY OF WHITTIER, a Charter City; WHITTIER CITY COUNCIL; ELVIN PORTER individually and as Planning Director for the City of Whittier; J. ROBERT FLANDRICK individually and as City Attorney for the City of Whittier; and JAMES BALE individually and as Chief of Police of the City of Whittier, Defendants-Appellants.	No. 85-6112 D.C. No. 84-5067-R ORDER

Before: PREGERSON and BEEZER, Circuit Judges, and JAMESON, District Judge*

Walnut Properties, Inc. (Walnut) brought this action in district court, seeking (1) a declaration that Ordinance No. 2327 of the City of Whittier was unconstitutional

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

insofar as it prohibits an adult theatre from operating within 1,000 feet of a church; (2) an injunction against closure of a theatre operated by Walnut; and (3) compensatory and punitive damages against Elvin Porter, Planning Director for the City of Whittier, and J. Robert Flandrick, Whittier City Attorney, for denying Walnut its property rights without due process and denying it freedom of speech, when they recommended the adoption of Ordinance 2327.

Walnut filed a motion for partial summary judgment declaring Ordinance 2327 unconstitutional; and Porter and Flandrick filed a cross motion for summary judgment or, in the alternative, for partial summary judgment on the grounds that (1) Ordinance No. 2327 is constitutional, (2) defendants are immune from all liability, and (3) plaintiff is not entitled to recover damages even if defendants were subject to liability. The district court granted Walnut's motion for partial summary judgment, and denied the motion of defendants Porter and Flandrick.

In a prior action, Walnut I, this court affirmed a decision of the district court holding a similar ordinance of the City of Whittier, Ordinance No. 2257, unconstitutional. Walnut Properties, Inc. v. City of Whittier, Nos. 84-5755, 84-8087 (9th Cir. May 14, 1985). The district court in this case (Walnut II), relied upon the holding of this court in Walnut I.

The disposition of this court in Walnut I was vacated by the Supreme Court, City of Whittier v. Walnut Properties, 106 S.Ct. 1255 (1986) (mem.), and the case was remanded to this court for further consideration in light of City of Renton v. Playhouse Theatres, Inc., 106 S.Ct. 925 (1986).

By order dated April 22, 1986, submission of this case for decision was deferred pending the decision on remand of this court in Walnut I.

On October 21, 1986, this court remanded Walnut I to the district court, saying in part:

> Furthermore, the availability of alternative sites must be considered in light of the purpose and effect of the ordinance. In Renton, the effect of the ordinance was to concentrate adult theaters into the available area. 106 S.Ct. at 931. Whittier's ordinance is designed to eliminate the concentration of adult theaters by prohibiting adult theaters from locating within 1,000 feet of each other. We therefore remand this issue to the district court so that it may make specific findings as to the availability of land in light of Renton, and whether the City of Whittier has "effectively den[ied] [Walnut Properties] a reasonable opportunity to open and operate an adult theater within the city." 106 S.Ct. at 932.

The judgment in this case is vacated, and the cause remanded to the district court for further proceedings consistent with the decisions of the Supreme Court in City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986), and this court in Walnut I, Nos. 84-5755, 84-6087, filed October 21, 1986.

WALNUT PROPERTIES, INC., a California Corporation and Vincent Miranda, an individual, Plaintiffs/Appellees,

v.

CITY OF WHITTIER, a Charter City; M.D. Klaxton, R.L. Henderson, L.A. Strong, Gene Chandler, V.A. Lopez, as Members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and John Robert Flandrick, as City Attorney of the City of Whittier, Defendants/Appellants.

Nos. 84-5755, 84-6087.

United States Court of Appeals,
Ninth Circuit.

Oct. 21, 1986.

As Amended Jan. 20, 1987.
As Amended on Denial of Rehearing
and Rehearing En Banc
March 10, 1987.

Owner of adult theater brought suit claiming that ordinance requiring 1,000 feet separation between adult theater and church was unconstitutional. The United States District Court for the Central District of California determined that ordinance had unconstitutional effect, and city and other defendants appealed. The Court of Appeals, 774 F.2d 1176, affirmed. After remand by the United States Supreme Court, 106 S.Ct. 1255, the Court of Appeals, Boochever, Circuit Judge, held that: (1) finding that a motivating factor in city's decision to enact ordinance prohibiting location of adult theaters within 1,000 feet of residential zones, churches, or school was to restrict exercise of First Amendment rights was not of itself sufficient to hold regulation

presumptively invalid; presumption of invalidity would apply only if underlying or predominant purpose in enacting ordinance were suppression of First Amendment rights, and (2) if predominant purpose were not improper, ordinance should be analyzed as form of time, place, and manner regulation.

Vacated and remanded.

Beezer, Circuit Judge, filed concurring opinion.

1. Constitutional Law ⇐ 90.4(4)

Regulations enacted for purpose of restraining speech on basis of content presumptively violate First Amendment, and thus, court should look to city's motive in enacting ordinance prohibiting location of adult theaters within 1,000 feet of residential zones, churches, or school, before examining whether oridnance is valid content-neutral regulation of time, place, and manner of protected speech. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐ 90.4(4)

Finding that a motivating factor in city's decision to enact ordinance prohibiting location of adult theaters within 1,000 feet of residential zones, churches, or school was to restrict exercise of First Amendment rights was not of itself sufficient to hold regulation presumptively invalid; presumption of invalidity would apply only if underlying or predominant purpose in enacting ordinance were suppression of First Amendment rights. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐ 90.4(4)

If predominant purpose, as opposed to motivating factor, for enacting ordinance restricting locations of adult theaters were not improper, ordinance should be analyzed as form of time, place, and manner regulation;

appropriate inquiry is whether ordinance is designed to serve substantial governmental interest and allows for reasonable alternative avenues of communication. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐ 90.4(4)

Even if ordinance restricting locations of adult theaters were enacted for proper purpose and designed to further substantial interest, court must still examine whether city effectively denied theater owner reasonable opportunity to open and operate adult theater within city, in determining whether ordinance violates First Amendment. U.S.C.A. Const.Amend. 1

5. Constitutional Law ⇐ 90.4(4)

In determining whether ordinance restricting permissible locations for adult theaters violates First Amendment, availability of alternative sites must be considered in light of purpose and effect of ordinance. U.S.C.A. Const.Amend. 1.

Stanley Fleishman, Los Angeles, Cal., for plaintiffs/appellees.

J. Robert Flandrick, City Atty., City of Whittier & Burke, Williams & Sorensen, Katherine E. Stone, Benjamin S. Kaufman, Lisa E. Kranitz, Los Angeles, Cal., for defendants/appellants.

On Remand from the Supreme Court of the United States.

Before BOOCHEVER and BEEZER, Circuit Judges, and SOLOMON,* District Judge.

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

BOOCHEVER, Circuit Judge:

In *Walnut Properties, Inc. v. City of Whittier,* nos. 84-5755, 84-6087 (9th Cir. 1985) (mem.), [762 F.2d 1020 (Table)], we affirmed the district court's findings and conclusions that the City's ordinance requiring a 1,000 feet separation between an adult theater and a church had been unconstitutionally motivated, that the ordinance had an unconstitutional effect, and that its infringement on first amendment rights was not justified. Thus, we held that the ordinance violated the first amendment because it was not shown to justify legitimate government needs, because it severely restricted protected speech, and because one of the City's reasons for enacting the ordinance was to suppress that speech. *Id.* at 2. We also held that Walnut Properties' action was not barred by the doctrine of res judicata, and that the district court did not abuse its discretion in awarding attorneys' fees to Walnut. Our disposition was vacated by the Supreme Court, *City of Whittier v. Walnut Properties,*—U.S.___, 106 S.Ct. 1225, 89 L.Ed.2d 566 (1986) (mem.), and the case remanded to this court for further consideration in light of *City of Renton v. Playtime Theatres, Inc.,* ___ U.S. ___, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The parties in *Walnut Properties* were ordered to submit supplemental briefs addressing the application of *Renton* on May 1, 1986. We have reconsidered this case in light of *Renton,* and we vacate the district court's decision. The district court applied our precedents in reaching its conclusions. Because these precedents have been modified by *Renton,* we find it necessary to remand so that the district court may make new findings and conclusions in light of *Renton's* teachings.[1]

[1] We reinstate, however, the portion of our prior memorandum disposition affirming the district court's decision not to apply the

FACTS

In *Walnut Properties,* the district court found that the City's ordinance substantially restricted first amendment interests, and that a motivating factor for enacting the ordinance was to suppress first amendment interests. The district court expressly held that "[t]he provision of the ordinance which prohibits an adult theater from operating within 1000 feet of a church is unconstitutional because the City failed to justify this prohibition."

Walnut Properties owned its theater and began exhibiting adult films in May 1977. On June 22, 1977, the City enacted its first "urgency" ordinance (No. 2116) imposing certain limitations on adult businesses. This ordinance was reenacted several times, resulting in the challenged Ordinance No. 2138 (Nov. 7, 1978). The district court found that

> [e]xcept for its proximity to a church, Walnut's theater met all of the locational requirements of the first ordinance. The theater is located in the C-2 zone; is not within 500 feet of any lot classified in any of the R zones; is not within 1000 feet of any lot upon which there is located any public, private or parochial, elementary, Junior High, High School; is not within 1000 feet of any lot upon which there is located a city-owned . . . public park; is not within 1000 feet of any lot on which there is located another adult business; and is not within 500 feet of any lot on which there is located a business with [specified types of alcohol beverage licenses].

doctrine of res judicata. The award of attorneys' fees must await the outcome of the remand.

The court further found that "Walnut Theatre is the only theater in Whittier exhibiting adult films, and it is within 1000 feet of a church." The City of Whittier had prepared a study and report on which the district court relied in part. The court found:

> Prior to enacting the first ordinance, the City prepared a report dealing with the concentration of adult businesses and their effect upon immediately adjacent residential and commercial property. The report states that a "brief discussion with a representative of Whittier Presbyterian Church revealed that while the representative was very much aware of the presence of adult businesses, there was no evidence of direct impact on the church." The report noted that churches are closed during the peak hours when adult businesses operate. Therefore, the report stated, the effect of an adult business on a church would naturally be less than on parks. . . . The report did not reveal sufficient justification for prohibiting an adult theater from operating within 1000 feet of a church, nor did the City present any evidence revealing that any such justification existed.

The court referred to the testimony of Mr. Elvin Porter, Director of Planning of the City of Whittier. Mr. Porter "sought to justify the [1,000 feet] separation, stating that 'most churches are against the display of the human body . . . for anyone that wants to view the human body and acts.' " The court found that "[i]t thus appears that a motivating factor in the decision to prohibit an adult business from operating within 1,000 feet of a church was to restrict plaintiffs' exercise of

First Amendment rights." The court further found that "Mr. Porter also justified the separation of an adult theater from a church by stating that their proximity created a 'morals' conflict."

The court next expressly found that the ordinance "makes it impossible to operate an adult theater in the central business district of Whittier because there is no location in that area which is not within 1000 feet of a church, school or park, or within 500 feet of an R-zone." The court concluded that "[s]ince Walnut has the only theater in Whittier exhibiting adult films, its elimination would leave the City without any theaters showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the City of Whittier." Finally, the court found that

> [t]he City has also failed to establish that its desire to prevent blighting and downgrading of commercial and residential areas adjacent to a concentration of adult businesses could not be accomplished without prohibiting an adult theater from operating within 1,000 feet of a church. Indeed, the proximity of an adult theater to a church appears to be totally unrelated to the "blighting and downgrading" of commercial and residential areas adjacent to "concentrated" adult businesses. There is no sufficient factual basis for the City's decision to prohibit an adult theater from operating within 1,000 feet of a church.

ANALYSIS

1. Motive

[1] The Supreme Court stated in *Renton* that because the city's ordinance did not ban adult theaters altogether,

but merely provided that such theaters may not be located within 1,000 feet of residential zones, family dwellings, churches, parks, or schools, the ordinance was properly analyzed as a form of time, place, and manner regulation. 106 S.Ct. at 928. The Court further stated, however, that it "has long held that regulations enacted *for the purpose* of restraining speech on the basis of its content presumptively violate the First Amendment." *Id.* (citations omitted) (emphasis added). The district court should thus look to the City's motive in enacting the ordinance before examining whether the ordinance is a valid content-neutral regulation of the time, place, and manner of protected speech.

[2] The district court stated that "a motivating factor" in the City's decision to enact the ordinance was to restrict the exercise of first amendment rights. The court made this finding on the basis of testimony that most churches were opposed to the display of the human body. In *Renton* the Supreme Court rejected this court's reliance on *Tovar v. Billmeyer,* 721 F.2d 1260, 1266 (9th Cir.1983), *cert. denied,* 469 U.S. 872, 105 S.Ct. 223, 83 L.Ed.2d 152 (1984), which held that zoning decisions were invalid if *a motivating factor* in making them was to restrict the exercise of first amendment rights. 106 S.Ct. at 929. Thus, a finding that "a motivating factor" in enacting the ordinance is to restrict first amendment rights is not of itself sufficient to hold the regulation presumptively invalid. That presumption now applies only if the predominate purpose in enacting the ordinance is suppression of first amendment rights. *Id.*

The district court in this case made other findings from which it could be inferred that the purpose in enacting the ordinance was to suppress first amendment rights. The ordinance in this case does not by its terms

ban adult theaters altogether, but the district court found that it had that effect. Moreover, there are indications in the record that the City enacted its ordinance in response to Walnut Properties' exhibition of adult films.

In *Renton*, the Court relied upon the district court's finding that "the Renton ordinance is aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's '*predominate* concerns' were with the secondary effects of adult theaters. . . ." 106 S.Ct. at 929 (emphasis added by the Court). In contrast, the district court in this case found that the proximity of an adult theater to the church appeared to be "totally unrelated to the 'blighting and downgrading' of commercial and residential areas adjacent to 'concentrated' adult businesses." The court, however, did not have the benefit of *Renton's* distinction between an improper motivating factor and an unconstitutional predominant purpose in enacting such an ordinance. *See Renton*, 106 S.Ct. at 929. As the Court discussed in *Renton*, the district court must conduct its inquiry into the city's motive within the limits set out in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
>
> Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 383-84, 88 S.Ct. at 1682-83; *see Renton,* 106 S.Ct. at 929.

We remand for the district court to reexamine its findings and make additional findings if necessary to determine whether the City of Whittier enacted its ordinance for the predominant purpose of suppressing Walnut Properties' first amendment rights. If the court so finds, the ordinance should be declared invalid.

2. Method

[3] If the court finds that the predominant purpose, as opposed to a motivating factor, for enacting the ordinance was not improper, it should analyze the enactment as a form of time, place, and manner regulation. *Renton,* 106 S.Ct. at 928. The appropriate inquiry is whether the "ordinance *is designed to serve a substantial governmental interest* and allows for reasonable alternative avenues of communication." *Id.* at 930 (emphasis added).

We recognize that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *Renton,* 106 S.Ct. at 930 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976)). Unlike the findings of the district court in *Renton,* however, the district court here expressly found that the City had failed to establish that its desire to prevent blighting and downgrading of commercial and residential areas adjacent to a concentration of adult businesses was related to the proximity of an adult theater to a church. There is no concentration of adult theaters in Whittier; the Walnut Properties' theater is the only one.

Furthermore, the City's interest in preventing urban blight and downgrading of residential and commercial

properties might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but it might not support the requirement that they be 1,000 feet from a church. Although the City may rely on the studies and experiences of other cities, *Renton,* 106 S.Ct. at 930-31, the City here also relied on its own study, and asked that the court take notice of it. That study noted that a representative of the Whittier Presbyterian Church, though aware of the adult theater's proximity, said there was no evidence of direct impact on the church. Moreover, the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the Walnut Properties Theater are 500 feet on their longest side. It appears that the 1,000 feet requirement is not necessary to prevent such theaters from being located in the same block as a church.

The district court here held that the City failed to meet its burden of proving that its decision to separate a church and an adult theater by 1,000 feet furthers a *compelling* government interest. Thus, the court imposed a more difficult legal burden of proof than the one required by *Renton*: a *substantial* government interest. We remand for the court to determine whether the ordinance as designed by the City furthers a substantial government interest, or whether the City's restriction of Walnut Properties' first amendment freedom is "greater than is essential to the furtherance" of the asserted governmental interests. *See American Mini Theatres, Inc.*, 427 U.S. at 80, 96 S.Ct. at 2457 (Powell, J., concurring).

3. Availability of Other Sites

[4] The Court stated in *Renton* that "[i]n our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . ." 106 S.Ct. at 932. Thus, even if the ordinance was enacted for a proper purpose and was designed to further a substantial interest, the court must still examine whether the City has effectively denied Walnut Properties a reasonable opportunity to open and operate an adult theater within the City.

In *American Mini Theatres,* 427 U.S. at 72-73, 96 S.Ct. at 2453 (plurality opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, JJ.), and 427 U.S. at 84, 96 S.Ct. at 2439 (Powell, J., concurring), the Supreme Court held that a Detroit zoning ordinance requiring adult movie theaters to be more than 1,000 feet from other adult movie theaters was a reasonable time, place, and manner regulation of protected speech. The City of Whittier ordinance is similar to the *American Mini Theatres* ordinance with one exception: the City of Whittier ordinance would close the only existing business. The zoning ordinance in *American Mini Theatres* applied prospectively only and prescribed where adult theaters could be opened; it did not prohibit the operation of adult movie theaters throughout the city, and it did not force existing adult theaters to close. 427 U.S. at 52-55, 95 S.Ct. at 2443-45. The Detroit ordinances were not challenged on the ground that they

> impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing

> public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

Id. at 62, 96 S.Ct. at 2448.

If the ordinance at issue in *American Mini Theatres* had affected the operation of existing theaters, the Court indicated that the situation would have been different:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight."

Id. at 71-72 n. 35, 96 S.Ct. at 2453 n. 35 (plurality opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, JJ.). Only four justices joined in Part III, the portion of *American Mini Theatres* from which this statement is taken. However, based on the dissenting opinions of Justice Stewart, *id.* at 84, 96 S.Ct. at 2459 (joined by Brennan, Marshall, and Blackmun, JJ.), and of Justice Blackmun, *id.* at 88, 96 S.Ct. at 2461 (joined by Brennan, Stewart, and Marshall, JJ.), there is little doubt that a majority would have questioned an ordinance putting all existing theaters out of business.

In *Renton* the Court found that the ordinance was not enacted for the purpose of suppressing the exercise of first amendment expression.

> The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. As Justice Powell observed in *American Mini Theatres,* "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location."

106 S.Ct. at 929 (citations omitted).

Rather, the Court found that Renton's ordinance allowed for reasonable alternative avenues of communication, because the ordinance left some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. *Id.* 106 S.Ct. at 932. The district court had found that the 520 acres of land consisted of " '[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.' " *Id.* (citation omitted).

In this case, however, the district court found that the provision of the ordinance requiring a 1,000 feet separation of church and adult theater "makes it impossible to operate an adult theater in the central business district of Whittier," and that "[s]ince Walnut has the only theater in Whittier exhibiting adult films, its elimination would leave the City without any theaters showing such films, and the ordinance's effect would

then be a total exclusion of adult theaters in the City of Whittier."

The evidence on this issue included the testimony of Mr. Porter, the City's Planning Director, for the City of Whittier, and Mr. Metcalfe, a real estate appraiser, for Walnut Properties. Mr. Porter testified that there were thirty-five acres in Whittier upon which an adult theater could be located. Mr. Metcalfe testified that there were twelve acres, all of which were in the Whitwood Shopping Center. In its Supplemental Brief, the City now contends that Mr. Porter testified that within Whittier, of the 742.5 acres zoned for commercial uses, 99.5 acres, or 13.4% of the total commercially zoned area, are available to adult businesses under the ordinance. Even if the City's higher figures are accepted, we note that the areas zoned for commercial uses make up only 19.2% of the total acreage in Whittier. This means that only 1.35% of the entire land area of Whittier is available for use as adult theater sites. This available area is significantly less than the five percent of the entire land area that was available in *Renton.* We also observe that Renton is a city of approximately 32,000 people. *Renton,* 106 S.Ct. at 927. Whittier has a population of about 70,000, at least twice that of Renton. Thus, Renton's 520 acres of available land takes on greater significance compared to Whittier's 99.5 acres. Of course, if the district court accepts Mr. Metcalfe's testimony of only 12 available acres, then the percentage of available land in Whittier diminishes significantly.

[5] Furthermore, the availability of alternative sites must be considered in light of the ordinance's purpose and design. In *Renton,* the City designed its ordinance so as to *concentrate* adult theaters in the available areas. 106 S.Ct. at 931. Whittier designed its ordinance to

eliminate concentrations of adult theaters. It prohibits adult theaters from locating within 1,000 feet of each other. We therefore remand this issue to the district court so that it may make specific findings as to the availability of land in light of *Renton,* and whether the City of Whittier has "effectively den[ied] [Walnut Properties] a reasonable opportunity to open and operate an adult theater within the city." 106 S.Ct. at 932.

VACATED and REMANDED.

BEEZER, Circuit Judge, concurring.

I agree that the judgment should be vacated and the cause remanded to the district court for further proceedings consistent with the Supreme Court's decision in *City of Renton v. Playtime Theatres,* —— U.S. ——, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

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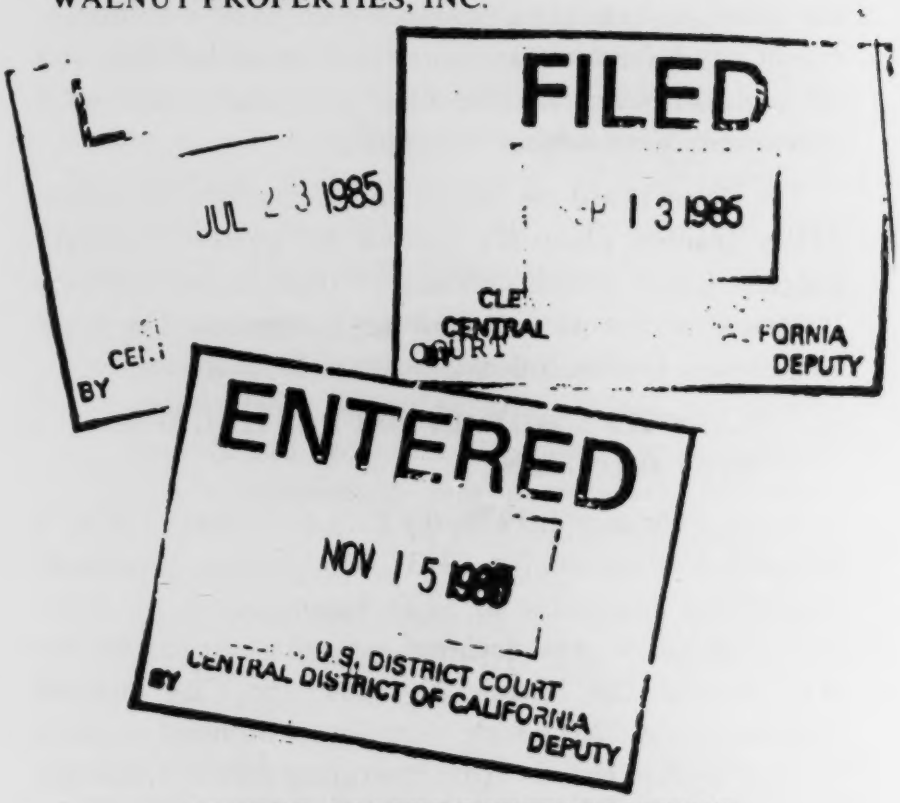


UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation, Plaintiff, v. CITY OF WHITTIER, etc., et al., Defendants.	CASE NO. 84-5067-R PROPOSED ORDER

APPENDIX I

On July 15, 1985, the Court heard Cross-Motions for Summary Judgment. Plaintiff sought partial summary judgment declaring Ordinance No. 2327 of the City of Whittier unconstitutional insofar as it prohibits an adult theater from operating within 1,000 feet of a church. Defendants moved the Court for summary judgment or in the alternative for partial summary judgment on the grounds that (1) Ordinance No. 2327 is constitutional, (2) defendants are immune from all liability, and (3) plaintiff is not entitled to recover damages even if defendants were subject to liability.

The Court heard the parties, and being fully informed, orally granted plaintiff's motion for partial summary judgment, and denied defendants' motion for summary judgment or for partial summary judgment. The basis for the said Orders follows:

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A. On February 7, 1978, the City of Whittier ("City") adopted Ordinance No. 2137 establishing locational regulations applicable to adult businesses in the City. This Ordinance was declared unconstitutional by the state courts. On March 20, 1981, the City enacted Ordinance No. 2257 which, inter alia, prohibited an adult motion picture theater from operating within 1,000 feet of a church. On March 4, 1984, this Court entered Findings of Fact and Conclusions of Law and Judgment, holding Ordinance No. 2257 unconstitutional insofar as it prohibits an adult motion picture theater from operating within 1,000 feet of a church. Walnut Properties, Inc. v. City of Whittier, No. 81-2262-R (Walnut I).

The Court's Findings and Conclusions provide that plaintiff had the only adult theater in the City; that the

City had failed to meet its burden of proving that the 1,000 foot separation between a church and an adult theater furthered "a compelling government interest unrelated to the suppression of free expression"; and that the City "failed to establish that its desire to prevent blighting and downgrading of commerical and residential areas adjacent to a concentration of adult businesses could not be accomplished without prohibiting an adult theater from operating within 1,000 of a church." Indeed, the Court concluded that the proximity of an adult theater to a church "appears to be totally unrelated to the 'blighting and downgrading' of commercial and residential areas adjacent to 'concentrated' adult businesses." This Court concluded:

> Because the City has failed to justify the provision of its ordinance prohibiting an adult theater from operating within 1,000 feet of a church, and because a motivating factor in the City's establishing that prohibition was to restrict the exercise of First Amendment rights, that provision of Ordinance No. 2257 is unconstitutional, violating the free speech and press provisions of First and Fourteenth Amendments."

Porter and Flandrick, defendants herein, played important roles in Walnut I: Porter was the City's expert witness and Flandrick was trial counsel.

B. On March 15, 1984 - less than a week after the Findings and Conclusions were filed in Walnut I Porter - "requested and recommended the Planning Commission initiate the appropriate proceedings" to reenact the provision of the ordinance found unconstitutional by the court. Defendant Porter there stated that "[t]he City Attorney has recommended that a study be done and

the spacing requirement be readopted subject to adequate grounds justifying the distance between theater and churches." The recommendation was "that the Planning Commission recommend to the City Council the readoption of the zoning regulation which established the requirement for a one thousand foot separation between churches and adult businesses." Porter recommended adoption of the Ordinance, when it came before the City Council.

The approach taken by defendants Flandrick and Porter can be gleaned from two letters to defendant Porter found in the record. One letter was from the Associate Minister of the First Christian Church dated March 6, 1984. It reads in relevant part:

> I am writing to let you know that our church is in agreement with your attempt to prove the incompatibility of land uses between our church and the Pussycat Theater.

The other letter was from the Senior Minister of First Baptist Church dated April 18, 1984. It reads in relevant part:

> I have received your letter of March 1st concerning the City's ordinance relating to the establishment of adult businesses. The City is involved in litigation against the Pussycat Theater in uptown Whitter, seeking to close this establishment because of regulations covered in the ordinance. . . . After considerable . . . discussion, the Board voted unanimous agreement with the action of the City of Whittier in seeking to close the Pussycat Theater in uptown Whittier. We feel that this "adult business" is completely incompatible to our church and its attempt to influence Whittier

to continue to be a community of upright moral citizens.

C. Ordinance No. 2327 became effective May 22, 1984. On July 10, 1984, plaintiff filed the complaint herein for damages and for injunctive and declaratory relief, declaring the Ordinance unconstitutional insofar as it prohibits an adult theater from locating within 1,000 feet of a church. (Walnut II) Damages were sought from defendants Porter, Flandrick and the City. By stipulation, this case was stayed pending decision by the Ninth Circuit in Walnut II.

On May 14, 1985, the Ninth Circuit filed its Memorandum affirming this Court's judgment. Walnut Properties, Inc. v. City of Whittier, Nos. 84-5755, 84-6087. Addressing the Ordinance involved in this case the court stated:

> The City offered no evidence to support its agrument. It cited cases holding that concentrations of adult businesses caused urban blighting and that a municipality could legitimately require these businesses not to locate near one another. There is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one. Furthermore, this interest might logically support the ordinances' requirement that adult businesses be 1,000 feet apart, but not that they be 1,000 feet from a church.
>
> Even if we take notice of the staff report produced at the time Ordinance No. 2327 was enacted and of the latest ordiance, as the City has asked us to do, we arrive at the same conclusion. The report itself and the later statements again rely on the inapplicable

> Young case for the proposition that concentrations of adult businesses have an adverse effect on neighborhoods. And the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[ ] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the Wardman are 500 feet on their longest side. It is therefore apparent that the 1,000 feet requirement is not necessary to prevent such theatres from being located in the same block as a church.

Discussing the lack of availability of other sites for an adult theater, the court noted:

> The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the Ordinance's effect would then be a total exclusion of adult theaters in Whittier."

Id. at 7.

The court also affirmed the district court's conclusion that a motivating reason for enacting the Ordinance was to suppress protected expression. The court stated:

> The district court's finding that the City's action was improperly motivated is . . . supported by the record. Mr. Porter stated that one reason for the church provision was that "most churches are against the display of the human body" and that adult theaters conflict with the morals of the churches.

Id. at 8.

The court noted that the minutes at which the City enacted Ordinance 2327 reveal an improper motive, since they "reveal clearly that the purpose of the reenactment was to avoid the impact of the district court's findings." Id. at 9-10.

D. There is no dispute concerning the matters set forth above. Accordingly, since there are no material issues of fact concerning plaintiffs' motion for partial summary judgment, the court declares that the City of Whittier's Ordinance No. 2327 is unconstitutional on its face and as applied to plaintiff, insofar as it prohibits an adult theater from operating within 1,000 feet of a church.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

A. Defendants' motion for summary judgment declaring Ordinance No. 2327 to be constitutional is denied.

B. The motion of defendants Porter and Flandrick for a declaration that they are entitled to qualified "good faith" immunity shielding them from liability for damages is denied.

In Walnut I, this court"clearly" held that the provision of the City's Ordinance prohibiting an adult theater from operating within 1,000 feet of a church violated plaintiff's federal constitutional rights. When defendants Flandrick and Porter recommended to the City Planning Commission, and the City Council, the reenactment of the Ordinance prohibiting plaintiff from operating within a thousand feet of a church, they caused the violation of plaintiff's "clearly established constitutional right." A reasonable person would have known this.

Hence, the claim of defendants Flandrick and Porter of a "good faith" qualified immunity defense is meritless.

C. The motion of defendants Porter and Flandrick for summary judgment declaring that they are shielded from liability for damages on the ground that they have "absolute" legislative immunity, is denied.

The papers on file reveal that neither Porter nor Flandrick is a legislator, or a legislative aide. Porter is the City's Planning Director and Flandrick is a partner in the law firm of Burke, Williams & Sorensen, and acts as the City Attorney for Whittier. Both were acting in executive capacities when they performed the acts complained of herein, and they do not enjoy legislative immunity. Cinevision Corp. v. City of Burbank, 745 F.2d 560 (9th Cir. 1984).

The recent case of Mitchell v. Forsyth, 53 USLW 4798 (1985), makes it plain that defendants Porter and Flandrick are not entitled to legislative immunity. Mitchell makes clear that the grant of absolute immunity - legislative or judicial - is extremely limited. Thus, while the President has such immunity, the Attorney General exercising the President's powers, does not. The Court stated that the considerations of separation of powers "that call for absolute immunity for state and federal legislators and for the President of the United States do not command a similar immunity for cabinet officers or other high executive officials." Id. at 4801.

The Court rejected Mitchells' claim that as the Attorney General, he was entitled to absolute immunity because of the nature of the function he was performing.

> Because Mitchell was not acting in a prosecutorial capacity in this case, the situations

> in which we have applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his peformance of the "national security function."

Id. at 4801.

The Court added that in deciding whether officials performing a particular function are entitled to absolute immunity, it has generally looked for a historical or common law basis for the immunity in question. The legislative immunity recognized in Tenney v. Brandhove, 341 U.S. 367 (1951), the Court stated, "was rooted in the long struggle in both England and America for legislative independence, a presupposition of our scheme of representative government." Ibid. Mitchell, the Court stated, "points to no analogous historical or commonlaw basis for an absolute immunity for officers carrying out tasks essential to national security." Similary, the defendants herein can point to no analogous historical or common law basis for low level bureaucrats seeking to oust an unwelcome theater from its city.

Mitchell observed that most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed, saying:

> Legislators are accountable to their constituents . . . and the judicial process is largely self-correcting. . . . Similar built-in restraints on the Attorney General's activities in the name of national security, however, do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are

completely unnecessary.

Id. at 4801.

Neither Porter nor Flandrick "are subject to other checks that help to prevent abuses of authority from going unredressed."

The Court stated that the danger that high federal officials will disregard constitutional rights in their zeal to protect the National security is sufficiently real to counsel against affording such officials "an absolute immunity." Id. at 4801. Similarly, the danger that low level bureaucrats will disregard constitutional rights in their zeal to protect "morality" counsels against giving them absolute immunity.

Finally the Court stated that "good faith qualified immunity" is ample to protect an official from vexatious complaints. The Court added:

> [H]e may on occasion have to pause to consider whether a proposed cause of action can be squared with the Constitution and laws of the United States. But . . . "[w]here an official could be expected to know that his conduct would violate . . . constitutional rights, he should be made to hesitate. . . ."

Id. at 4802, emphasis in original.

For the aforesaid reasons defendants are not entitled to legislative immunity.

D. Defendants Motion for Summary Judgment on the ground that plaintiff is not entitled to recover damages even if defendants are subject to damages is denied. It appears that counsel charged plaintiff for appearing before the City Council in opposition to passage of Ordinance No. 2327. This, at least, is a proper item of damages. Murphy v. City of Flagler Beach, 761

F.2d 622, 625 (11th Cir. 1985) (Plaintiff "able to recover the fees that his attorney charged him for attending the City commission meeting.") Upon a proper showing, plaintiff is also entitled to punitive damages against defendants Porter and Flandrick. Cinevision Corp. v. City of Burbank, supra.

ORDER

1. Plaintiff is entitled to partial summary judgment declaring that City of Whittier Ordinance No. 2327, on its face and as applied to plaintiff, is unconstitutional, violating the First and Fourteenth Amendments to the United States Constitution, insofar as it prohibits an adult motion picture theater from operating within 1,000 feet of a church. The Court so declares.

2. Defendants' motion for summary judgment or alternatively for partial summary judgment is denied in all respects.

MANUEL L. REAL

JUDGE, UNITED STATES DISTRICT COURT
CENTRAL DISTRICT, CALIFORNIA

J1

FILED
APR 22 1986
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALNUT PROPERTIES, INC., a California corporation, Plaintiff/Appellee, vs. CITY OF WHITTIER, a Charter City; WHITTIER CITY COUNCIL; ELVIN PORTER individually and as Planning Director for the City of Whittier; J. ROBERT FLANDRICK individually and as City Attorney for the City of Whittier; and JAMES BALE individually and as Chief of Police of the City of Whittier, Defendants/Appellants.	No. 85-6112 D.C. No. CV 84-5067-R ORDER

Before: PREGERSON and BEEZER, Circuit Judges, and JAMESON, District Judge*

Submission of this case for decision will be deferred pending the decision on remand by this court in Walnut Properties, Inc. v. City of Whittier, Nos. 84-5755/84-6087 (9th Cir. Sept. 30, 1985), vacated and remanded, 54 U.S.L.W. 3582 U.S. Mar. 3, 1986).

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX J

Supreme Court of the United States

No. 85-1116

City of Whittier, et al.,

Appellants,

v.

Walnut Properties, Inc., et al.,

APPEAL from the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the statement of jurisidiction and motion to affirm,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of City of Renton v. Playtime Theatres, Inc., 475 U.S. ___ (1986).

IT IS FURTHER ORDERED that the appellants, City of Whittier, et al, recover from Walnut Properties, Inc., et al. Two Hundred Dollars ($200.00) for their costs herein expended.

March 3, 1986

Clerk's costs: $200.00

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual,

Plaintiffs-Appellees,

v.

CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier,

Defendants-Appellants.

Nos. 84-5755, 84-6087
D.C. No. CV 81-2262-R

AMENDED
MEMORANDUM*

FILED

SEP 3 01985

CLERK, U.S. COURT OF APPEALS

On appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Argued and submitted —
February 8, 1985, Pasadena, California

*The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,** District Judge.

The City of Whittier (City) appeals a declaration that its zoning ordinance is unconstitutional. It also asserts the action below was barred by the doctrine of res judicata. The state action to which it refers did not result in a final judgment; therefore, res judicata does not apply. The ordinance violates the first amendment because it was not shown to justify legitimate government needs, because it severely restricts protected speech and because one of the City's reasons for enacting the ordinance was to suppress that speech. The district court's award of attorneys' fees to appellee was not an abuse of discretion.

Discussion

A. Res Judicata

In its opening brief, the City argues, without distinguishing them, that the doctrines of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) barred the district court suit. The two will be dealt with separately.

Res judicata bars a party from relitigating not only issues actually decided in a prior suit but also all those stemming from the same cause of action. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School District,* No. 81-5772, slip op. at 8 (9th Cir. Feb. 21, 1985) (en banc); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4406 & n.4 (1981) [hereinafter cited as Wright, Miller & Cooper]. Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. 28 U.S.C. § 1738 (1982); *Migra v. Warren*

**Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

City School District Board of Education, ___ U.S. ___, 104 S. Ct. 892, 896-98 (1984); *Los Angeles NAACP*, slip op. at 8. In California, subsequent litigation is precluded 1) between the same parties, 2) on the same cause of action, if 3) "the first suit concluded in a final judgment on the merits." *Los Angeles NAACP*, slip op. at 8 (citing *Agarwal v. Johnson*, 25 Cal. 3d 932, 954, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979); *Slater v. Blackwood*, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975)). Plaintiff Walnut Properties, Inc. does not dispute that the first two requirements are satisfied here.

But no final judgment has issued from the state courts on whether Ordinance No. 2257 is constitutional as applied. The second state appellate decision did not purport to determine this question. *See* 149 Cal. App. 3d 633, 642, 197 Cal. Rptr. 127, 133 ("*If* [it] does not prevent the entry of new theatres into the market place, the ordinance is not unconstitutional as applied") (emphasis supplied; citation omitted). Instead it remanded to the state trial court. *Id.* The City's assertion that the state appellate court "decided the Ordinances were constitutional in all respects" is most charitably deemed wishful thinking. Federal law is clear that no preclusive effect is given when the appellate court reverses the trial court and remands for further proceedings, but no remand hearing is held. *E.g.*, *Aurora City v. West*, 74 U.S. (7 Wall.) 82, 93 (1868) (where judgment for plaintiff was reversed and remanded, defendant could not invoke res judicata); *Los Angeles NAACP v. Los Angeles Unified School District*, 518 F. Supp. 1053, 1058-59 (C.D. Cal. 1981), *rev'd on other grounds*, No. 81-5772; *see also* Wright, Miller & Cooper, *supra*, §4432, at 302-04 & n.22 ("If the matter is dropped after remand without proceeding to a new final judgment, there is no preclusion at all.").

B. Collateral Estoppel

Collateral estoppel or issue preclusion is a distinct doctrine from res judicata. It prevents 1) the same parties from relitigating 2) the same issue of fact or law which was actually litigated previously 3) after a full and fair opportunity to litigate 4) which resulted in a final judgment on the merits. *See, e.g.*, Wright, Miller & Cooper, *supra*, § 4416; *see generally Bernhard v. Bank of America National Trust & Savings Association*, 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942).

Of the three factual issues on appeal, the state courts have clearly not decided whether alternative sites exist for the Wardman Theatre in Whittier and have apparently not decided whether the ordinances were motivated by a desire to restrict speech. (In its first, vacated opinion, the appellate court had based its finding that the ordinance was not unconstitutionally motivated on its "finding" that alternative sites were available to Walnut. It did not comment on the motivation issue in its second opinion.) The district court was not estopped from deciding these issues. *See Bleeck v. State Board of Optometry*, 18 Cal. App. 3d 415, 429, 95 Cal. Rptr. 860, 869 (1971).

Although the language it used is somewhat ambiguous, we do not believe the state appellate court decided whether the City had narrowly tailored the ordinance to a compelling government need.

> In assessing the reasonableness of a regulation we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions must not only serve significant state interest but must leave

> open adequate alternative channels of communication. . . .
>
> In the case at bench, the zoning ordinance . . . is reasonable as to time, place and manner if it leaves open alternative channels of communication . . . and does not violate the First Amendment. . . .
>
> . . . .
>
> . . . If the ordinance herein merely disperses adult theatres . . . [i]t is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

149 Cal. App. 3d at 641-42. The court apparently believed that whether the ordinance was narrowly tailored to a valid interest and whether there were adequate alternative channels, are two questions that are intertwined. In other words, it believed the ordinance would be "narrowly tailored" only if sufficient sites remained for the protected speech.

We do not believe the state appellate court decided whether the ordinance was narrowly tailored to a valid interest and we therefore hold the district court was not estopped from deciding this question.

C. Constitutionality

We need not decide whether the appropriate standard of review for these issues is de novo or clear error, *see generally United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc) (some mixed questions of law and fact reviewed de novo, some reviewed for clear error), *cert. denied*, 105 S. Ct. 101 (1984); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 535 (9th Cir. 1984) (some first amendment issues reviewed de novo); *also Pullman-Standard v.*

Swint, 456 U.S. 273, 288-89 (1982) (motive a "pure question of fact"), for under either standard we affirm the findings of the district court.

1. Governmental Interests

"[F]ederal courts strictly scrutinize zoning decisions that impinge on first amendment rights." *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1984). "[T]he incidental restriction on first amendment freedoms can be 'no greater than is essential to the furtherance' of the governmental interest." *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79-80 (1976) (Powell, J., concurring)).

The City offered no evidence to support its argument. It cited cases holding that concentrations of adult businesses caused urban blighting and that a municipality could legitimately require these businesses not to locate near one another. There is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one. Furthermore, this interest might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but not that they be 1,000 feet from a church.

Even if we take notice of the staff report produced at the time Ordinance No. 2327 was enacted and of the latest ordinance, as the City has asked us to do, we arrive at the same conclusion. The report itself and the later statements again rely on the inapplicable *Young* case for the proposition that concentrations of adult businesses have an adverse effect on neighborhoods. And the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the

Wardman are 500 feet on their longest side. It is therefore apparent that the 1,000 feet requirement is not necessary to prevent such theatres from being located in the same block as a church.

2. Availability of Other Sites

If the ordinance severely restricts the availability of a form of protected speech in Whittier, it violates the first amendment. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981); *Alexander v. City of Minneapolis*, 698 F.2d 936, 938-39 (8th Cir. 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

The evidence on this issue included the testimony of Mr. Porter, the City Planning Director, for the City of Whittier, and Mr. Metcalfe, a real estate appraiser, for Walnut Properties. Mr. Porter testified that there were thirty-five acres in Whittier upon which an adult theatre could be located. Mr. Metcalfe testified that there were twelve acres, all of which were in the Whitwood Shopping Center. Walnut contends these acres will also be unavailable if the Center is considered to be one "lot" for the purposes of the ordinance. The district court was entitled to believe Mr. Metcalfe, and although the ordinance does not by itself ban adult theatres from Whittier the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy will probably have the same effect. In any event, this court may take judicial notice of the fact that a circle with a radius of 1,000 feet covers an area of seventy-three acres. Thus, if one theatre located

in the Whitwood Center, all other adult businesses would be barred from the City.

3. Motive

An ordinance is also unconstitutional if "a motivating reason for the Council's actions" was "to suppress protected expression." *Tovar*, 721 F.2d at 1266 (modifying previous test that "the real purpose" of the ordinance had to be suppression). The district court found that the City's action was improperly motivated. It based that finding at least in part on deposition testimony by Mr. Porter, the City Planning Director. Without objection Porter testified that the staff report recommending the original emergency ordinance did not state a justification for the ordinance, but that the actual justification was that churches were morally opposed to "the display of the human body."

Porter's testimony is admissible for determining the motive behind the ordinance if it showed objectively "the chain of events from which intent may be inferred." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984); *Tovar*, 721 F.2d at 1264-67; *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983). Testimony may not be admitted, however, which speculates about the subjective intentions of individual legislators. *See Foley*, 747 F.2d at 1298-99. We consider the testimony, in the absence of objection, as a statement of the chain of events leading to the ordinance's enactment.

We observe a number of characteristics of the ordinance and events surrounding its enactment also support a finding of improper motive. For example, the first emergency ordinance was passed very shortly after Walnut began to show adult films and at a time when some groups in Whittier protested an adult theatre's locating there. The ordinance did not contain a

grandfather clause and no valid governmental purpose has been shown for it. The district court could also have properly relied on these objective facts. We therefore affirm the finding of improper motive.

D. Attorney's Fees

Walnut, as a successful plaintiff in an action brought under 42 U.S.C. § 1983 (1982), moved for $39,035 in attorneys' fees, which amount the district court awarded. The City contends that only $3,862 should be allowed. This court reviews the amount of the award for abuse of discretion. *See* 42 U.S.C. § 1988 (1982); *Blum v. Stenson*, ___ U.S. ___, 104 S. Ct. 1541, 1545 (1984); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838 n.8 (9th Cir. 1982). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum*, 104 S. Ct. at 1543-44.

1. Hourly Rate

This court has declined to endorse the "lodestar approach" used in other circuits under which, absent special circumstances, the starting figure for an hourly rate should be "counsel's normal billing rate." *Moore*, 682 F.2d at 840. Instead, it adheres to a list of twelve factors for determining the fee award as a whole. *See id.* at 838 (listing factors), 840 (approving *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976)). The factors which seem to directly affect an attorney's hourly rate include the skill required in the case, the customary fee, the experience, reputation, and ability of the attorney, and the length of the professional relationship with the client.

Walnut's hourly rate is not unreasonable for a case which wound its way through five different courts and

for an attorney who has orally argued ten cases before the United States Supreme Court, who has practised for thirty-five years, and who has been awarded $200 per hour in another matter.

This conclusion is reinforced by the fact that the City failed to develop any evidence from an impartial expert witness that the rate was unreasonable.

2. Hours Spent on "Unsuccessful Claims"

In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the Supreme Court stated that "[i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." In such a case, if the plaintiff succeeds on only some of his claims, he will not be awarded attorneys fees for time spent on unsuccessful claims. *Id.* at 435.

Although Walnut's complaint did allege violations of several constitutional provisions and amendments, each stemmed from a common factual predicate. Furthermore, in *Blum*, the Court stated: "[W]e reiterate what was said in *Hensley*: 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.' " 104 S. Ct. at 1550 (quoting *Hensley*, 461 U.S. at 435). In fact this highlights that the *Hensley* case involved a plaintiff who obtained less *relief* than it had sought. *See Hensley*, 461 U.S. at 436-37. In this case, as the district court observed, plaintiff received all the relief it asked for. Here, too, the City failed to introduce any evidence that the time spent was unreasonable. Walnut will be compensated for all hours reasonably spent as found by the district court.

3. Contemporaneous Logs

The City observes that the *Hensley* Court permitted the district court there to reduce an award of attorneys' fees in part because of "inadequate documentation." *Hensley*, 461 U.S. at 433. But the Court also stated that "[w]e reemphasize that the district court has discretion in determining the amount of a fee award." *Id.* at 437. The district court here did not make such a reduction and it is not an abuse of discretion not to do so. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir. 1983).

4. Mr. Metcalfe

The City argues that "[a]ll the time [Walnut's attorney] spent with Mr. Metcalfe must be deducted because Mr. Metcalfe's expertise and testimony at trial had nothing whatsoever to do with the issue on which Walnut prevailed." From the discussion above, it is apparent that Mr. Metcalfe was a critical witness whose testimony persuaded the district court to find for Walnut on an important issue.

5. Different Tasks

The City cites one authority in this circuit for the proposition that the trend in the Ninth Circuit is to differentiate between the kinds of legal work involved. *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F. Supp. 77 (N.D. Cal. 1978). No authority appears for the proposition that failing to do so is an abuse.

In *Hensley*, the Court admonished that a "request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. The district court was aware of the different tasks performed by Walnut's attorneys and awarded an average rate based on all. This efficient procedure should not be deemed an abuse by a panel

aware of the great discretion vested in trial courts to award reasonable fees.

CONCLUSION

The district court was not barred from determining whether the ordinance violated the first amendment as applied or any of the factual issues allegedly determined in the prior action. Its findings that the ordinance had been unconstitutionally motivated, that it had an unconstitutional effect, and that the infringement it caused had not been justified are each a basis for declaring the ordinance unconstitutional and we affirm each. Finally, the court did not abuse its discretion in awarding reasonable attorneys' fees.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
MAR -8 1984
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Deputy
By

FILED
MAR 8 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

WALNUT PROPERTIES, INC., a California corporation; and VINCENT MIRANDA,

Plaintiffs,

v.

CITY OF WHITTIER, a Charter City, et al.,

Defendants.

CV 81-2262-R

JUDGMENT

The Court, having made its Findings of Fact and Conclusions of Law, now makes the following Judgment:

1. That Ordinance Nos. 2116, 2121, 2128, 2138, 2254, and 2257, as adopted by the City Council of the City of Whittier, are, except as is expressly hereinafter set forth, valid and subsisting, having been properly and lawfully adopted by the said City Council. The exception, above referred to, is that that portion of Ordinance No. 2257 which prohibits the location of an adult business within 1,000 feet of a church (subsection (2) of Section (c) of Section

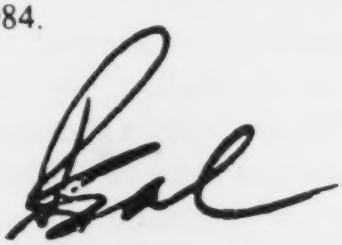
9512.1 of the Whittier Municipal Code as adopted by Ordinance No. 2257), is declared invalid on the ground that at the time of the public hearing preceding the enactment of the said ordinances, there was insufficient evidence presented to the City Council to support its conclusion that this portion of the regulations was reasonably required to protect the public health, safety and general welfare.

2. Defendants, their agents, servants, employees and representatives are enjoined from initiating any criminal proceedings against plaintiffs, their employees, representatives or agents, based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California, solely because it is within 1,000 feet of a church.

3. Defendants and their agents, servants, representatives and employees are enjoined from initiating any injunction proceedings against plaintiffs, their agents, servants, representatives or employees based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California, solely because the theater is within 1,000 feet of a church.

4. Defendants shall pay plaintifffs costs in the amount of $_____.

DATED: March 8, 1984.



MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

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LOS ANGELES, CALIFORNIA 90067
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FILED
MAR 8 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
MAR - 9 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation; and VINCENT MIRANDA, Plaintiffs, v. CITY OF WHITTIER, a Charter City, et al., Defendants.	No. 81-2262-R FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter duly came on for trial before the Honorable Manuel L. Real, Chief Judge, United States District Court for the Central District of California, Stanley Fleishman appearing for plaintiffs and Robert Flandrick appearing for defendants. The court having heard the evidence and being fully informed now makes the following Findings of Fact and Conclusions of Law.

APPENDIX N

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief as follows:

A. Plaintiffs seek to obtain a judicial declaration that the City of Whittier's "Adult Business Ordinance", as it applies to a motion picture theater, is unconstitutional on its face, and as applied, violating the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek injunctive relief to prevent the defendants from enforcing the said ordinance against plaintiffs; and

B. Defendants by their counter-claims seek a judicial declaration that the ordinance is valid and subsisting.

2. The plaintiffs herein are Walnut Properties, Inc., a California corporation ("Walnut"), and Vincent Miranda, its President.

3. The defendants are City of Whittier, a Charter City; M. D. Klaxton, R. L. Henderson, L.A. Strong, Gene Chandler, V. A. Lopez, as members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and John Robert Flandrick as City Attorney of the City of Whittier.

4. Walnut is the owner of certain real property located at 7028 Greenleaf Avenue, Whittier, California, more particularly described as Lots 15, 16, and 17 of Block 20 of Whittier, in the City of Whittier, County of Los Angeles, State of California, as per map recorded in Book 21 at pages 55 and 56 of Miscellaneous Records, in the Office of the Recorder of the County of Los Angeles, (hereinafter "Property").

5. Walnut, an exhibitor of motion picture films, is engaged in an activity which is protected by the First and Fourteenth Amendments to the Federal Constitution, so long as the motion picture films are not obscene.

6. During May 1977, Walnut commenced to operate upon the Property a motion picture theater, exhibiting "Adult" films, as part of its chain of "PussyCat Theaters".

7. On June 22, 1977, the City enacted as an "urgency measure" Ordinance No. 2116 which had the purpose and effect of imposing certain limitations on "adult businesses".

8. On October 11, 1977, the City enacted as an "urgency measure" Ordinance No. 2121 reenacting, and readopting the terms and provisions of Ordinance No. 2116. On December 7, 1977, the City enacted as an "emergency measure" Ordinance No. 2128 which essentially continued in effect the provisions of Ordinance No. 2116, as it related to "adult businesses."

9. The emergency ordinances culminated in the enactment of Ordinance No. 2138 (hereinafter "first ordinance") on November 7, 1978. Except for its proximity to a church, Walnut's theater met all of the locational requirements of the first ordinance. The theater is located in the C-2 zone; is not within 500 feet of any lot classified in any of the R zones; is not within 1000 feet of any lot upon which there is located any public, private or parochial, elementary, .Junior High, High School; is not within 1000 feet of any lot upon which there is located a city-owned, operated and maintained public park; is not within 1000 feet of any lot on which there is located another adult business; and is not within 500 feet of any lot on which there is located a business with a type-40-, 42-, 80-,and 61-on-sale alcohol beverage license.

10. Walnut Theatre is the only theater in Whittier exhibiting adult films, and it is within 1000 feet of a church. By reason of its proximity to a church, the City filed an action against Walnut pursuant to the first

ordinance seeking an injunction restraining Walnut from operating its theater, as an adult theater, at 7028 Greenleaf Avenue, Whittier, California, because of its closeness to a church. *City of Whittier v. Walnut Properties, Inc., et al.*, LASC No. SEC 29232.

11. The case was heard by the Honorable Vincent Dalsimer, Judge, Los Angeles Superior Court. On March 24, 1981, Judge Dalsimer filed Findings of Fact and Conclusions of Law holding that the first ordinance was unconstitutional on its face. He stated that the portion of the ordinance prohibiting an adult theater from locating within 500 feet of a "public facility which is utilized by minors," has the legal effect of prohibiting the location of any adult business on any location within the City. Judge Dalsimer concluded:

> "The absolute prohibition of an otherwise lawful business constitutes a violation of the state and Federal Constitutions and such ordinance is found to be void as applied to the defendant Walnut herein.
>
> "Walnut is entitled to a judgment dismissing the complaint against it."

12. On the same day Judge Dalsimer signed his Findings of Fact and Conclusions of Law the City passed and approved as an emergency ordinance, Ordinance No. 2257, the ordinance involved in this case. Basically, this second ordinance is the same as the first ordinance, except that it eliminates the prohibition of operating an adult theater within 500 feet of a "public facility which is utilized by minors." This second ordinance, like the first ordinance, prohibits an adult theater from operating within 1000 feet of a church.

13. On May 7, 1981, Walnut filed its complaint in this case alleging that unless restrained, the defendants

would initiate criminal proceedings against plaintiffs for operating an adult theater in a forbidden area and would seek injunctive relief requiring plaintiffs to discontinue exhibiting constitutionally protected film dealing with sex in their theater.

14. The City filed a Notice of Appeal on April 29, 1981 from Judge Dalsimer's ruling holding the first ordinance unconstitutional.

15. This court conducted a full trial prior to the time the appellate proceedings were concluded in the state court. A chronology of the events in the state appellate courts follows:

A. On February 1, 1983, the state Court of Appeal reversed the judgment of the Superior Court, holding that the trial court should have based its decision on the second ordinance, not on the first ordinance under which the complaint was filed. The Court of Appeal then held the second ordinance to be constitutional.

B. On February 15, 1983, in response to plaintiffs' Petition for Rehearing, the Court of Appeal modified its opinion and judgment and ordered the Superior Court to hold a hearing to determine whether plaintiffs' theater was an adult theater within the meaning of the ordinance. The court then denied the Petition for Rehearing.

C. On May 19, 1983, in response to plaintiffs' Petition for Hearing, the California Supreme Court granted the Petition and retransferred the matter to the Court of Appeal with directions to reconsider on remand its order in certain enumerated respects.

D. On December 8, 1983, the Court of Appeal rendered its second decision, stating in relevant part:

> "No evidence having been introduced on the crucial issue of the availability of other areas

> in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue."

The Court of Appeals reversed the judgment of the Superior Court, stating:

> "On remand, the trial court shall make the necessary rulings on proffered evidence to the status of the theater as an 'adult theater' and as to the availability of alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

E. On February 2, 1984, the California Supreme Court denied plaintiffs' petition for hearing.

16. On February 13, 1984, this court held a hearing to consider events which occurred after the completion of the trial herein. After considering the events occurring in the state court and two recent decisions of the United States Court of Appeals for the Ninth Circuit (*Tovar, et al. v. Billmeyer,* 721 F.2d 1260 (9th Cir. 1983) and *Cinema Arts, Inc. v. County of Clark,* 722 F.2d 579 (9th Cir. 1983)) the court concluded that there was no reason why it should not render its decision herein.

17. The provision of the ordinance which prohibits an adult theater from operating within 1000 feet of a church is unconstitutional because the City failed to justify this prohibition. Prior to enacting the first ordinance, the City prepared a report dealing with the concentration of adult businesses and their effect upon immediately adjacent residential and commercial property. The report states that a "brief discussion with a representative of Whittier Presbyterian Church revealed that while the representative was very much aware of the presence of adult businesses, there was no

evidence of direct impact on the church." The report noted that churches are closed during the peak hours when adult businesses operate. Therefore, the report stated, the effect of an adult business on a church would naturally be less than on parks. The report stated:

> "[I]t may be in the community interest to require separation between adult businesses and parks. Five Hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas five hundred feet or under can be 'wandered into.' "

The report did not reveal sufficient justification for prohibiting an adult theater from operating within 1000 feet of a church, nor did the City present any evidence revealing that any such justification existed.

18. At trial, Elvin Porter, Director of Planning of the City of Whittier, sought to justify the separation, stating that "most churches are against the display of the human body. . . for anyone that wants to view the human body and acts." Displaying or viewing the human body in the nude is within the broad protection of the First Amendment. *Schad v. Borough of Mt. Ephraim*, 542 U.S. 61, 101 S.Ct. 2176 (1981). It thus appears that a motivating factor in the decision to prohibit an adult business from operating within 1000 feet of a church was to restrict plaintiffs' exercise of First Amendment rights.

19. Mr. Porter also justified the separation of an adult theater from a church by stating that their proximity created a "morals" conflict. It is settled that moral objections to First Amendment activities cannot justify

an ordinance impinging on freedom of expression. *Morris v. Municipal Court for San Jose-Milpitas Jud. Dist.*, 32 C.3d 553, 186 Cal.Rptr.494 (1982). Moreover prohibiting an adult theater, exhibiting constitutionally protected film, from operating within 1000 feet of a church raises substantial First Amendment questions concerning the separation of church and state. *See, Larkin v. Grendel's Den, Inc.*, ___ U.S. ___, 103 S.Ct.505 (1982).

Finally, the City has failed to meet its burden of proving that its decision to separate a church and an adult theater by 1000 feet furthers a compelling government interest unrelated to the suppression of free expression. The provision of the ordinance requiring a 1000-foot separation between an adult theater and a church makes it impossible to operate an adult theater in the central business district of Whittier because there is no location in that area which is not within 1000 feet of a church, school or park, or within 500 feet of an R- zone.

20. Since Walnut has the only theater in Whittier exhibiting adult films, its elimination would leave the City without any theaters showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the City of Whittier.

CONCLUSIONS OF LAW

1. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) (4), 2201, 2202, and pursuant to 42 U.S.C. § 1983.

2. Abstention is not appropriate in this case. *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 279 (9th Cir. 1983).

3. The judgment of the state Court of Appeal, reversing the judgment of the Superior Court, has not resulted in a judgment on the merits, and *res judicata* is inapplicable to this case. No state tribunal has taken evidence on whether the City adequately justified the provision of its ordinance prohibiting an adult theater from operating within 1000 feet of a church. Where, as here, plaintiffs preserve their right to have federal constitutional claims resolved in a federal court, the federal court must exercise the jurisdiction entrusted to it by the Constitution and laws of the United States. The state proceedings relied upon by the defendants herein do not justify stripping the court of its proper jurisdiction. *See, Tovar v. Billmeyer,* 721 F.2d 1260, 1267 n. 8 (9th Cir. 1983).

4. Under the strict scrutiny standard, applicable to this case (*Tovar v. Billmeyer, supra,* 721 F.2d at 1264) Whittier's ordinance must be justified by a compelling state interest. The City has failed to meet its burden of proving that the provision of its zoning ordinance requiring a 1000-foot separation between a church and an adult theater furthers a compelling government interest unrelated to the suppression of free expression. The City has also failed to establish that its desire to prevent blighting and downgrading of commercial and residential areas adjacent to a concentration of adult businesses could not be accomplished without prohibiting an adult theater from operating within 1000 feet of a church. Indeed, the proximity of an adult theater to a church appears to be totally unrelated to the "blighting and downgrading" of commercial and residential areas adjacent to "concentrated" adult businesses. There is no sufficient factual basis for the City's decision to prohibit an adult theater from operating within 1000 feet of a church.

5. Because the City has failed to justify the provision of its ordinance prohibiting an adult theater from operating within 1000 feet of a church, and because a motivating factor in the City's establishing that prohibition was to restrict the exercise of First Amendment rights, that provision of Ordinance No. 2257 is unconstitutional, violating the Free Speech and Press provisions of the First and Fourteenth Amendments.

The Ninth Circuit has firmly established that:

> "zoning decisions may not constitutionally be made for the purpose of restricting protected First Amendment speech, including that which is sexually explicit. *See generally, Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1347 (9th Cir. 1982). Consequently, federal courts strictly scrutinize zoning decisions that impinge on First Amendment rights. *See generally, Young v. American Mini Theatres,* 427 U.S. 50, 56 and n. 12 (1976); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968); *Ebel v. City of Corona,* 698 F.2d 390, 392 (9th Cir. 1983). *Cf. Harper and Virginia Board of Elections,* 383 U.S. 663, 670 (1966). Under the strict scrutiny standard, zoning decisions aimed at regulating unprotected activities that incidentally limit free expression are valid only if justified by a compelling state interest. *Young,* 427 U.S. at 56 n. 12; *Ebel,* 698 F.2d at 392."

Tovar v. Billmeyer, 721 F.2d at 1264.

In *Tovar,* the court stated (at 1265, 1266, 1267):

> "A zoning decision that has as a purpose the restriction of protected First Amendment activities cannot survive strict constitutional scrutiny. . . .

> "If a motivating reason for the Council's actions was to prevent the theater from operating then the zoning decision would violate the First Amendment. . . . Defendant's case will depend on proof that the zoning decisions were motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression. . . . '[T]he District Court should make factual findings on the validity of the City's assertion of harm [to be prevented by zoning] and then closely scrutinize the [zoning] ordinance's relationship to prevention of the alleged harm.'. . . [I]n order for defendants to prevail, the court must find that other actions [less restrictive] could not have prevented the harms involved. *Kuzinich,* 689 F.2d at 1348."

6. Plaintiffs are entitled to a judgment declaring that the ordinance herein is unconstitutional insofar as it prohibits an adult theater from operating within 1000 feet of a church. Plaintiffs are also entitled to an injunction restraining the defendants from initiating any criminal proceedings against plaintiffs or their employees, or from initiating any injunctive proceedings against plaintiffs or their employees based upon the operation of plaintiffs' theater within 1000 feet of a church.

7. The ordinance applies to plaintiffs because their theater is within 1000 feet of a church. By invalidating the provision of the ordinance applicable to plaintiffs, they will receive all the relief they need. The ordinance is otherwise constitutional.

8. Plaintiffs, as the prevailing parties in this action, are entitled to a reasonable attorney's fee pursuant to 42 U.S.C. § 1988.

9. Any Finding of Fact which is more appropriately a Conclusion of Law and any Conclusion of Law which is more appropriately a Finding of Fact shall be so deemed.

LET JUDGMENT ENTER ACCORDINGLY.

MAR 8 1984

MANUEL L. REAL

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

ORDINANCE NO: 2327

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ADOPTING CERTAIN ZONING REGULATIONS RELATING TO ADULT BUSINESSES (APPLICANT: CITY INITIATED; CASE NO: 353.049)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare, as follows:

(a) That in certain pending litigation, a Federal District Court has determined that the City's Zoning Regulations applicable to adult businesses are valid, with the single exception which is hereinafter described; and

(b) That the Federal District Court's determination of validity, excepted therefrom that provision of the Zoning Regulations which prohibit the location of an adult business within 1,000 ft. of a church; and

(c) That the reason assigned by the Court for such invalidity was that at the time of the original hearings before the Planning Commission and City Council in 1977 and 1978 there was insufficient evidence to justify the conclusion that such a separation between uses was necessary or required; and

(d) That notwithstanding the fact that the portion of the Judgment declaring the provision invalid has been appealed, which appeal is now pending, on the advice of the City Attorney, the City instituted proceedings before the Planning Commission and

City Council, in the time and manner provided by law, to determine whether or not the 1,000 ft. separation should be readopted and placed in the City's Zoning Regulations; and

(e) That the Planning Commission has conducted duly noticed public hearings on said matter and has recommended that the 1,000 ft. limitation be readopted based upon evidence presented by the staff and others to the Commission; and

(f) That this City Council has conducted a duly noticed public hearing upon such matter and based upon the evidence presented, including, but not limited to, the Staff Report and oral testimony presented, and based upon the recommendations of the Planning Commission, including the Planning Commission's file with reference to said recommendation, it appears to the City Council that there is adequate need and evidentiary justification for the imposition of the 1,000 ft. limitation so as to prevent an irreconcilable incompatibility of uses, vis-a-vis, churches and adult businesses located within this City; and

(g) That the public interest, convenience and necessity require the enactment of this Ordinance containing the Regulation relating to the separation of uses as hereinabove described.

SECTION 2. That subsection (c) of subdivision (2) of Section 9512.1 of the Whittier Municipal Code is hereby readopted and reenacted to read as follows:

"(c) Is not located within 1,000 ft. of any lot upon which is located a church; or"

SECTION 3. That the California Environmental Quality Act, as amended, has been complied with with respect

to this proceeding. The City Council and Planning Commission have reviewed and considered the environmental studies conducted and have concluded that a negative declaration is appropriate and proper with respect to this project. That the said declaration be, and hereby is, approved and ordered filed.

SECTION 4. That the City Clerk shall certify the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED THIS 22nd day of May, 1984.

/S/ Myron D. Claxton

MYRON D. CLAXTON, Mayor

ATTEST:

/S/ Sandra Max

SANDRA MAX, Deputy City Clerk

ORDINANCE NO. 2257

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ENACTING CERTAIN PROVISIONS RELATING TO ADULT BUSINESSES.

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council heretofore enacted certain zoning regulations applicable to "adult businesses;" and

(b) That, in part, said regulations prohibiting the placement of adult businesses within certain distances of residentially zoned properties, and within certain distances of churches, schools, parks and other kinds of publicly owned facilities; and

(c) That the City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void; and

(d) That in order to prevent such purported invalidity from affecting the overall integrity and intended effect of the adult business regulations, as enacted, it is necessary that the City Council enact this measure to eliminate any ambiguity in the said zoning regulations applicable to adult businesses; and

(e) That the enactment of this Ordinance is required for the preservation of the public peace, health and safety.

SECTION 2. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

"9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and

(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) is classified in Zone C-2 or a less restrictive zone; and

(b) is not within five hundred (500) feet of any lot classified in any of the R Zones; and

(c) is not within one thousand (1,000) feet of any lot upon which there is located a church; or

(d) is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

(e) is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

(f) is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

(g) is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 and 61 on sale alcoholic beverage license."

SECTION 3. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

SECTION 4. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED this 24th day of March, 1981.

/S/ Victor A. Lopez

VICTOR A. LOPEZ, Mayor

ATTEST:

/S/ Jenny Young

JENNY YOUNG, City Clerk

ORDINANCE NO. 2254

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ENACTING CERTAIN PROVISIONS RELATING TO ADULT BUSINESSES. (URGENCY MEASURE)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council heretofore enacted certain zoning regulations applicable to "adult businesses"; and

(b) That, in part, said regulations prohibiting the placement of adult businesses within certain distances of residentially zoned properties, and within certain distances of churches, schools, parks, and other kinds of publicly owned facilities; and

(c) That the City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void; and

(d) That in order to prevent such purported invalidity from affecting the overall integrity and intended effect of the adult business regulations, as enacted, it is necessary that the City Council enact this measure, as an urgency ordinance, to eliminate any ambiguity in the said zoning regulations applicable to adult businesses; and

(e) That the immediate enactment of this Ordinance is required for the preservation of the public peace, health and safety; and

(f) That time does not permit the following of the procedures necessary for the adoption of zoning regulations, as described in Section 65800 et seq. of the Government Code, and that this urgency measure is necessary, and authorized by law, to protect the public safety, health and welfare by prohibiting uses which may be in conflict with the contemplated zoning proposal, as is hereinafter described in this Ordinance; and

(g) That the Planning Commission and the Planning staff are hereby instructed to forthwith take the steps necessary to set for public hearing the consideration of regulations which eliminate the possibility of invalidity insofar as the adult regulations are concerned.

SECTION 2. That this Ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. That a statement of facts constituting the basis of such urgency is as set forth hereinabove. That this Ordinance shall be in full force and effect for a period of One Hundred Twenty (120) days from and after the date of its enactment.

SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

"9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

(1) That prior to establishing or conducting of any adult business, a conditional use permit

therefor shall be obtained, pursuant to the provisions of Part 9 of this chapter; and

(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) Is classified in Zone C-2 or a less restrictive zone; and

(b) Is not within five hundred (500) feet of any lot classified in any of the R Zones; and

(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license."

SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining

provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED this 3rd day of February, 1981.

/S/ Victor A. Lopez
VICTOR A. LOPEZ, MAYOR

ATTEST:

/S/ Jenny Young
JENNY YOUNG, City Clerk

ORDINANCE NO. 2138

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ADDING PART 20 TO CHAPTER 1, ARTICLE IX, OF THE WHITTIER MUNICIPAL CODE AND AMENDING SECTIONS 9201, 9260 AND 9322 OF SAID CODE, REGULATING AND CONTROLLING ADULT BUSINESSES.

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine, and declare as follows:

(a) That certain businesses, hereinafter defined and described as "adult businesses," are located, and are proposed for location, within areas of the City which are zoned for commercial uses, and are immediately adjacent to residential areas; and

(b) That experience in this City, as well as in other portions of Southern California, and other areas, has demonstrated that such uses, when located in immediate proximity to one another, have operational characteristics which have a deleterious effect on immediately adjacent residential and commercial areas; and

(c) That the concentration of such uses substantially contributes to blighting and downgrading of adjacent commercial and residential areas; and

(d) That it is evident that special zoning regulations applicable to these and similar uses, are necessary to preserve the integrity of existing commercial areas of the City, and of residential areas which are in close proximity to such commercial areas; and

(e) That the public interest, convenience, necessity, and the general welfare of the City requires that such special zoning regulations be enacted.

SECTION 2. That Part 20 be, and is hereby, added to Article IX, Chapter I of the Whittier Municipal Code, consisting of Sections 9510 through 9513, inclusive, to read, respectively, as follows:

PART 20 - ADULT BUSINESSES

SECTION 9510. *Purpose* — The purpose of the adoption of the provisions of this Part is to establish a comprehensive set of regulations applicable to adult businesses and similar and related uses.

SECTION 9511. *Definition* - In addition to the definitions contained in Section 9110 et seq., of this Chapter, the following words and phrases shall, for the purposes of this Part, be defined as follows, unless it is clearly apparent from the context that another meaning is intended:

1. "*Adult Book Store*" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or related to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

2. "*Adult Business*" shall mean any business which is conducted exclusively for the patronage of adults, and as to which minors are specifically excluded from patronage thereat, either by law or by the operators of such business. "Adult Business" shall

also mean and include adult book stores, adult theaters, massage parlors, and modeling studios, adult motels or hotels, but not including those uses or activities, the regulations of which is preempted by State law.

3. *"Adult Hotel/Motel"* shall mean a hotel or motel, as defined in Section 9111(H) and (M) of this Code, which provides, through closed circuit television, or other media, material which is distinguished or characterized by the emphasis on matter depicting or describing or related to specified sexual activities or specified anatomical areas.

4. *"Adult Theater"* shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas.

5. *"Material"* relative to adult businesses, shall mean and include, but not be limited to, accessories, books, magazines, photographs, prints, drawings, paintings, motion pictures, and pamphlets, or any combination thereof.

6. *"Massage Parlor"* shall mean any establishment required to be licensed pursuant to Section 6280 et seq., of the Whittier Municipal Code.

7. *"Modeling Studio"* shall mean any establishment or business which provides for members of the public, the services of a live human model for the purpose of reproducing the human body, wholly or partially in the nude, by means of photography, painting, sketching, drawing, or other pictorial form.

8. *"Specified Anatomical Areas"* shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;

(ii) buttock, and

(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

9. *"Specified Sexual Activities"* shall mean:

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

SECTION 9512. *Special Regulations* - All uses subject to the provisions of this Part shall comply with all of the regulations contained in this Chapter, and the following regulations:

1. that prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this Chapter; and

2. that no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) is classified in zone C-2 or a less restrictive zone; and

(b) is not within 500 feet of any lot classified in any of the R zones; and

(c) is not within 1,000 feet of any lot upon which there is located a church, or educational institution, park, or other public facility which is utilized by minors; and

(d) is not within 1,000 feet of any lot on which there is located another adult business; and

(e) is not within 500 feet of any lot upon which is located a business with a type 40, 42, 48, or 61 on-sale alcoholic beverage license.

SECTION 9513. *Nonconforming Adult Businesses* - All adult businesses which were lawfully in existence as of the effective date of Ordinance No. 2138, and which were rendered nonconforming by the application thereto of the provisions of this Part, shall be subject to abatement in the times and manner set forth in Part 10 hereof.

SECTION 3. That subsection 9 of Section 9260 of the Whittier Municipal Code be amended by adding subparagraph (bb) to read:

(bb) Adult business, subject to the provisions of Part 20 of these regulations.

SECTION 4. That subsection 2 of Section 9322 of the Whittier Municipal Code is hereby amended by adding thereto, as subparagraphs (l) and (m), the following:

(l) Adult book stores and adult theaters, in existence as of the effective date of Ordinance No. 2138, 120 days after the effective date of said Ordinance No. 2138.

(m) Adult businesses, lawfully in existence as of the effective date of Ordinance No. 2138, other than

those referred to in subsection (1) hereof, a period of 18 months after the effective date of said Ordinance No. 2138.

SECTION 5. That subparagraph (55) of Section 9201 of the Whittier Municipal Code is hereby deleted.

SECTION 6. That the City Council has considered the initial study conducted with respect to the matter above described. The City Council has, as a result of its said consideration, and the evidence presented at the hearings on the said matter, determined that the negative declaration as heretofore filed and proposed as a result of the said initial study, is appropriate, and does hereby find that the said negative declaration has been prepared and considered pursuant to the provisions of the California Environmental Quality Control Act of 1970, as amended, and does hereby approve the said negative declaration.

SECTION 7. *Severability* - If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The Council hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, phrases, or portions be declared invalid or unconstitutional. If for any reason this Ordinance or any part thereof should be declared invalid or unconstitutional, then the original ordinance, or ordinances, which this Ordinance, or part thereof, supersedes shall be in full force and effect.

SECTION 8. That the City Clerk shall certify to the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

APPROVED and ADOPTED this 7th day of February, 1978.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

JENNY YOUNG, CITY CLERK

ORDINANCE NO. 2121.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER EXTENDING THE TERM OF ORDINANCE NO. 2116 FOR A PERIOD OF EIGHT (8) MONTHS. (URGENCY MEASURE)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That on or about June 21, 1977, this City Council enacted Ordinance No. 2116, which had the effect of imposing, as an urgency measure, certain zoning regulations pertaining to adult businesses, as therein described; and

(b) That the said Ordinance required that the Planning staff and Planning Commission conduct a full and complete study for the purpose of recommending to the City Council final and permanent zoning regulations to be applied to such adult businesses; and

(c) That this City Council is in receipt of a Staff Report indicating that such study, although pursued with due diligence, has yet to be completed and that additional time is required therefor, due to the complexity of such study; and

(d) That said Ordinance No. 2116 will expire, prior to the completion of such study, unless the same is, pursuant to law, extended for an additional period of eight (8) months; and

(e) That the facts and circumstances as recited in said Ordinance No. 2116 still obtain, and the

said regulations as imposed by said Ordinance are still required for the reasons therein stated; and

(f) That a duly noticed public hearing was conducted by the said City Council for the purpose of considering whether the facts were such as to warrant the extension, for a period of eight (8) months, of the terms and provisions of said Ordinance No. 2116; and based upon the evidence presented at said hearing, it appears that such extension of time is warranted and required in order to protect the public peace, health and safety and to promote the public interest, convenience and necessity.

SECTION 2. That the terms and provisions as set forth in said Ordinance No. 2116 are hereby re-enacted and readopted and the said ordinance is hereby extended for a period of eight (8) calendar months from and after the date of adoption of this ordinance. This ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. A statement of facts constituting its urgency is as set forth above.

SECTION 3. That the City Clerk shall cause this ordinance to be published in the manner prescribed by law.

PASSED and APPROVED this 11th day of October, 1977.

/S/ Jack Mele

JACK MELE, MAYOR

ORDINANCE NO. 2116

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER RELATING TO THE REGULATION AND CONTROL OF CERTAIN ADULT BUSINESSES (URGENCY MEASURE).

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council has been advised that certain adult businesses, as hereinafter defined and described, have been proposed to be located within areas of the City which are zoned for commercial uses, and are adjacent to residential areas; and

(b) That experience in this City, as well as in other portions of Los Angeles County, have demonstrated that such uses have objectionable operational characteristics which have a deleterious effect upon immediately adjacent residential and commercial areas; and

(c) That a concentration of such uses contributes to blighting or downgrading commercial areas; and

(d) That such concentration also has the effect of blighting adjacent residential areas; and

(e) That it appears that special zoning regulations applicable to these and other similar uses is necessary to preserve the integrity of the existing commercial areas of the City, and of residential areas which are located in proximity to such commercial areas; and

(f) That to allow such uses to be located in such areas without any interim regulations and control could have the effect of frustrating the contemplated zoning proposal, as above described; and

(g) That this Ordinance is immediately required to preserve such commercial and residential areas from the possible effect of blighting or downgrading, during such period of time as may be reasonably necessary to permit the City's Planning Department and Planning Commission to make a complete study and review as to precisely the nature of permanent zoning regulations to be imposed in order to protect such commercial and residental areas within the City, from a blighting or downgrading effect; and

(h) That the public interest, convenience and necessity require that this Ordinance be immediately adopted for the reasons above set forth.

SECTION 2. That notwithstanding any other provision of the Whittier Zoning Regulations, during such time as this Ordinance is in full force and effect, the uses hereinafter referred to shall be prohibited, except as herein provided:

(a) *DEFINITIONS*: For the purpose of this Ordinance, the phrases hereinafter set forth, shall be defined as follows:

(1) "Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing or relating to specified sexual activity or specified anaotmical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

(2) "Adult Business" shall mean and include an adult book store or adult theater.

(3) "Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized, by their emphasis on matter depicting, describing or relating to specified sexual activity or specified anatomical areas.

(4) "Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

(5) "Specified Anatomical Areas" shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;
(ii) buttock, and
(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(6) "Specified Sexual Activities" shall mean:

(a) human genitals in a state of sexual stimulation or arousal; and or

(b) acts of human masturbation, sexual stimulation or arousal; and or

(c) fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(b) *PROHIBITION OF CERTAIN USES.* That from and after the adoption of this Ordinance, no person shall establish or conduct, or permit to be established or conducted, upon any real property located within the City, an adult business, except in accordance with the provisions of this Ordinance.

(c) *CONDITIONAL USE PERMIT REQUIRED.* Adult businesses shall be permitted pursuant hereto only if,

(1) a conditional use permit therefor is first obtained; and

(2) the real property upon which use is proposed to be located, is classified, pursuant to the Whittier Zoning Regulations in Zones C-2, C-3 and M; and

(3) that the proposed location is not within 250 feet of any other real property which is classified in Zone R-E, R-1, R-2, R-3, or R-4; and

(4) that the proposed location is not within 500 feet of any other real property upon which there is located an adult business.

SECTION 3.That this Ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. A statement of facts constituting the basis of such urgency is as above set forth. The legal authority for the enactment of this Ordinance is Section 65858 of the Planning Act of the State of California, and other applicable statutes.

SECTION 4. The City Clerk shall certify the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

PASSED and APPROVED this 21st day of June, 1977.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

City Clerk

(3)

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1322

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF WHITTIER, a Charter City,

Petitioner,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the Court must accept the District Court's Finding of Fact that the City of Whittier's adult business zoning ordinance denied respondent a reasonable opportunity to exhibit constitutionally protected films in the City, because it is not clearly erroneous.

2. Whether the Ninth Circuit correctly held that the City of Whittier's ordinance, regulating the location of adult motion picture theaters, violated the First Amendment because it effectively denied respondent a reasonable opportunity to open and operate a theater exhibiting constitutionally protected adult films within the City.

3. Whether the Ninth Circuit correctly held that the District Court had not abused its discretion in awarding attorney's fees, with interest, to respondent for successfully obtaining a ruling that petitioner's ordinance violates the First Amendment.

LIST OF PARTIES

Petitioner has listed the parties interested in this matter.

Respondent Walnut Properties, Inc., has no parent company, subsidiary, or affiliate to list pursuant to Rule 28.1.

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No. 88-1322

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF WHITTIER, a Charter City,

Petitioner,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Walnut Properties, Inc., a California corporation respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 861 F.2d 1109 (1988).

COUNTERSTATEMENT OF THE FACTS

A. Ordinance No. 2257 – the Ordinance involved in *Walnut Properties, Inc. v. City of Whittier*, No. CV-81-2262-R.

In May 1977, respondent began operating a theater exhibiting constitutionally protected "adult" films in the City of Whittier. This caused a lot of "agitation" by some groups in the City who didn't want to have any adult theater in Whittier. A delegation consisting of a city councilwoman, a member of a citizen's group called Citizens for Decency Through Law, and the executive director of the Whittier Uptown Association was formed and they visited respondent's president, suggesting that respondent discontinue exhibiting adult films. When the suggestion was rejected, petitioner enacted an "emergency" ordinance on June 21, 1977, imposing locational restrictions on adult businesses. App. T.

The ordinance allowed petitioner's Planning Department time to study the problems associated with adult businesses, and to consider potential zoning remedies. A study was conducted, and it revealed that 13 adult businesses were located within the City boundary; these operations included respondent's adult motion picture theater, adult bookstores, massage parlors, and nude model studios. The study indicated several undesireable secondary effects associated with massage parlors and nude model studios, but none associated with adult theaters, or adult bookstores.

On March 24, 1981, following the study, petitioner enacted Ordinance No. 2257. App. P.[1] The ordinance prohibits adult businesses within 500 feet of residential lots and establishments holding liquor licenses, and within 1000 feet of schools, churches, parks, or other adult businesses. The ordinance also provides "[t]hat prior to establishing or conducting of any adult business, a conditional use permit therefore shall be obtained." App. P-2.[2] On May 7, 1981, respondent filed an action in the District Court claiming that the ordinance was invalid as applied to its theater located within 1000 feet of a church. Following a full trial, the District Court entered its Findings of Fact and Conclusions of Law on March 9, 1984. App. N. On January 12, 1987 the District Court entered new Findings and Conclusions following remand. App. F.

The District Court stated that petitioner's Planning Director "testified that the City had no evidence to support a finding that a church would suffer any adverse effect because it was located within 1000 feet of an adult theater." App. F-10. He further testified that there was

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[1] An earlier ordinance, enacted February 7, 1978 (App. R) was declared unconstitutional by a Judge of the Superior Court of the County of Los Angeles, State of California. See App. P-1 ("[T]he City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void. . . .")

[2] The District Court found that the obligation to obtain a conditional use permit put "the burden on an applicant to *demonstrate* that there is a need to establish an adult business at the particular location." App. F-12-13 (emphasis in original).

nothing shown that would be a specific problem between respondent's theater and a church, and that the "operational characteristics" of an adult theater "are similar to those of other kinds of theaters, and . . . the only difference between them is that an adult theater limits admission to adults and shows more sexual material." App. F-10-11. The District Court found that neither petitioner's study nor its testimony at trial justified prohibiting a single adult theater from operating within 1000 feet of a church, adding: "it appears that the City acted on mere negative attitudes or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." App. F-11.

The District Court noted that petitioner's Director of Planning sought to justify the church-adult theater separation, stating that the proximity of an adult theater to a church created a "morals" conflict and that "most churches were against the display of the human body . . . for anyone that wants to view the human body and acts." App. F-8.

The District Court found that the church-adult theater separation made it impossible to operate an adult theater in the central business district of the city because there is no location in that area which is not within 1000 feet of a church, school, or park or within 500 feet of a residential area. App. F-11. Additionally, the Court stated that since respondent had the only theater in the city exhibiting adult films, its elimination would leave the city without any theater showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the city. App. F-11.

The District Court also ruled that the city failed to meet its burden of proving that its decision to separate a

church and an adult theater by 1000 feet furthers a substantial zoning interest. App. F-11.

B. Ordinance No. 2327 – the Ordinance involved in *Walnut Properties, Inc. v. City of Whittier*, No. CV-84-5067-R.

On March 15, 1984 – less than a week after the Court made its Findings of Fact and Conclusions of Law declaring Ordinance No. 2257 unconstitutional, petitioners initiated proceedings to re-enact the ordinance. App. I-3-4. Petitioner's Planning Director sought new evidence to justify the 1000 foot church-adult theater separation by soliciting comments from several church officials. One response was from the senior minister of the First Baptist Church who wrote in relevant part:

> I have received your letter of March 1st concerning the City's ordinance relating to the establishing of adult businesses. The City is involved in litigation against the Pussycat Theater in uptown Whittier, seeking to close this establishment because of regulations covered in the ordinance . . . . After considerable . . . discussion, the Board voted unanimous agreement with the action of the City of Whittier in seeking to close the Pussycat Theater in uptown Whittier. We feel that this "adult business" is completely incompatible to our church and its attempt to influence Whittier to continue to be a community of upright moral citizens.

App. F-9-10.

Based on this "new" study petitioner enacted Ordinance No. 2327 on May 22, 1984. "That ordinance essentially amounted to a re-enactment of the previous ordinance held unconstitutional by the District Court just two months earlier. . . ." App. A-6.

In response to this new ordinance respondent filed another action in the District Court on July 10, 1984, attacking the constitutionality of Ordinance No. 2327. Respondent sought: (1) a declaration that the ordinance was invalid insofar as it prohibited an adult theater from operating within 1000 feet of a church; (2) an injunction against enforcement of the ordinance; and (3) damages against the City, City Attorney Flandrick, and Planning Director Porter.

On July 15, 1985, the District Court heard cross motions for summary judgment.[3] Respondent sought partial summary judgment to declare Ordinance No. 2327 unconstitutional, and petitioners sought summary judgment declaring the ordinance constitutional. Additionally, petitioners sought summary judgment giving the individually named defendants immunity. On September 13, 1986, the Court filed its order granting respondent's motion, declaring Ordinance No. 2327 unconstitutional, and denying petitioner's motion for immunity. App. I. Petitioners appealed from the Court's order denying the individually named defendants immunity.

C. The Court's Order Vacating *Walnut Properties, Inc. v. City of Whittier*, 762 F.2d 1042 (9th Cir. 1985)

On March 3, 1986, the Court vacated the judgment in *Walnut Properties, Inc. v. City of Whittier*, 762 F.2d 1020 (9th Cir. 1985) (table) and remanded to the Ninth Circuit for further consideration in light of *City of Renton v. Playtime*

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[3] On May 14, 1985, the Ninth Circuit filed its memorandum affirming the District Court's judgment in *Walnut Properties, Inc. v. City of Whittier*, CV-81-2262-R. App. I-5.

Theaters, Inc., 475 U.S. 41 (1986). *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1042 (1986).

In accordance with this Court's mandate, the Ninth Circuit vacated the District Court's judgments in both cases and instructed the District Court on remand to reconsider the evidence in light of *Renton*. App. G and H. The District Court complied. App. D and F. The District Court again found the challenged ordinances unconstitutional, demonstrating at length that they denied respondent a reasonable opportunity to operate its theater in the city. Petitioner appealed both cases and the Ninth Circuit consolidated them for appeal.

D. The Ninth Circuit's Ruling that both Ordinances are unconstitutional because they deny respondent a reasonable opportunity to operate its theater within the City.

On November 9, 1988, the Ninth Circuit rendered its opinion upholding the District Court's conclusion, that both ordinances are unconstitutional, relying on the District Court's finding that they "denied [respondent] a reasonable opportunity to operate its theater within the City." App. A-12.

1. The District Court found that "[t]he record demonstrates conclusively that the City's ordinance substantially restricts First Amendment interests, and was intended to do so." App. F-11. The District Court observed that petitioner's report in justification of its ordinance, stated that it was "quite obvious" that requiring an adult theater to be separated from a residential area by 500 feet "will have the effect of making *all* existing adult businesses, with the exception of [respondent's]

theater uptown, non-conforming uses subject to abatement." App. F-11-12 (District Court's emphasis). The Court stated that by prohibiting respondent from operating its theater uptown, because it is within 1000 feet of a church, "the Ordinance then has the effect of making *all* existing adult businesses, including [respondent's] theater subject to abatement." App. F-12 (emphasis in original).

The District Court discussed the disagreement between the respondent's expert Mr. Metcalf and the City's expert Mr. Porter, as to the availability of locations where an adult business could locate under the ordinance. Mr. Metcalf testified there were only 12 acres where an adult business could locate under the ordinance. Mr. Porter testified that the ordinance left 99.5 acres available in the industrial and manufacturing zones. Mr. Metcalf testified that the bulk of this acreage was not available for an adult theater because of the presence in the area of Nellie's School for Boys, the Palm View Assembly of God Church, and the Presbyterian Community Hospital. App. F-12. The District Court questioned whether Mr. Metcalf was correct in considering the Presbyterian Hospital and Nellie's School for Boys a church because each had a chapel. Nevertheless, the District Court stated, "it makes no sense to force [respondent] to move its theater from downtown because it is within 1000 feet of a church and have it locate within 1000 feet of the Presbyterian Hospital and Nellie's School for Boys." App. F-12. In this connection the Court noted that the ordinance requires *all* adult businesses to obtain a conditional use permit, thus putting the burden on respondent "to *demonstrate* that there is a need to establish an adult

business at the particular location." App. F-12-13. (Emphasis in original.)

Mr. Metcalf testified that the severe location requirements of petitioner's ordinance plus the conditional use requirement made it "impossible to establish an adult theater in Whittier, because there was no way one could persuade the Whittier authorities that there existed a 'demonstrated need' for an adult theater in the city." App. F-13. The District Court found that "[i]t is unlikely that the city would grant a conditional use permit to operate an adult theater within 1000 feet of the Presbyterian Hospital or [Nellie's School]." App. F-13.

Messrs. Porter and Metcalf also disagreed as to whether an adult business could locate within the Whitwood Shopping Center. Mr. Metcalf testified that according to the records of the assessor, every parcel in the Whitwood Shopping Center was owned by the same owner, and that it was a single lot and therefore the shopping center was not available for an adult business. The District Court stated that "[e]ven if Whitwood Shopping Center is deemed to consist of separate lots, as Mr. Porter testified, it is unlikely that [petitioner] would grant a conditional use permit to operate an adult business in the shopping center." App. F-13. The District Court went on to state that while theoretically there may be space in the shopping center which is more than 500 feet from a residence, there is no space where it is less than 1000 feet from a residence. The District Court stated that there was "no logic in forcing the removal of Walnut's theater from the downtown area because it is within 1000 feet of a church and permitting its relocation in the Whitwood Shopping Center where it would be within 1000 feet of a

residence." App. F-13. Mr. Metcalf also testified that areas Mr. Porter said were available for an adult theater, were in fact not available because the lots would have to be first subdivided before an adult business could locate in said area. App. F-14.

The District Court basically accepted the testimony of Mr. Metcalf and found "that there is only approximately 12 acres in Whittier where an adult theater might locate consistent with the ordinance." App. F-14. The Court stated that the effect of the ordinance was to substantially restrict respondent's opportunity to operate an adult theater in the city, adding that if an adult theater or a massage parlor were to open within the 12 available acres respondent would be precluded from operating its theater because the ordinance prohibited one adult business from operating within 1000 feet of another adult business. App. F-14.

The Court stated that petitioner's assertion that respondent could operate an adult theater in the city, other than where it was located was "sheer pretext." App. F-14. In short the District Court found that the purpose and effect of the ordinance, as it applied to respondent's theater, was "to greatly restrict lawful speech in violation of the First and Fourteenth Amendments." App. F-14.

2. The Ninth Circuit recognized that it was required to accept the District Court's factual findings because they are not clearly erroneous. Nevertheless, for the purposes of argument, the Circuit used the evidence most favorable to petitioner, that is, the 99.5 acre figure advanced by petitioner's expert Mr. Porter. App. A-13. The Court noted that under the terms of the ordinance an

estimation of total available acreage is next to meaningless because even accepting the city's presumptions regarding the availability of certain sites there were only three areas in which adult businesses might locate. App. A-15. "[T]ogether the areas would only allow a small handful of adult businesses to operate within the city, in light of the required 72-acre buffer zone imposed by the ordinance." App. A-15. As the Court noted "[a] circle with a radius of 1000 feet encompasses approximately 72 acres." App. A-14, n.4. The Court concluded that "[t]o hold, as the City argues, that there are adequate alternatives available for expression" of adult films "would make a mockery of First Amendment protection and would render meaningless the Supreme Court's admonition that an ordinance must not 'effectively den[y] . . . a reasonable opportunity to open and operate an adult theater within the city.' " App. A-16.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE FINDINGS BY BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT THAT PETITIONER'S ADULT BUSINESS ZONING ORDINANCE FAILS TO PROVIDE RESPONDENT WITH A REASONABLE OPPORTUNITY TO OPERATE ITS THEATER WITHIN THE CITY ARE FULLY SUPPORTED BY THE EVIDENCE AND ARE NOT CLEARLY ERRONEOUS.

BOTH COURTS FULLY CONSIDERED AND CORRECTLY APPLIED *CITY OF RENTON V. PLAYTIME THEATERS, INC.*, 475 U.S. 41 (1986).

In *Renton, supra,* at 53-54, the Court held that an ordinance regulating the location of adult motion picture

theaters violates the First Amendment if it effectively denies theater owners a reasonable opportunity to open and operate an adult theater within the city. The District Court found that petitioner's ordinance denies respondent a reasonable opportunity to operate an adult theater within the city and this finding is supported by detailed subsidiary findings. App. F-11-14.

In *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985) the Court explained that the "clearly erroneous" rule precludes a reviewing court from reversing the finding of a trier of fact even if "it is convinced that it would have decided the case differently." *Id.* at 573. A reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the District Court because the role of the appellate court "is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 393 U.S. 100, 123 (1969). When "the district court's account of the evidence is plausible in light of the record viewed in its entirety, [an appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Bessemer City, supra,* at 574. Where, as here, "there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." Ibid.; *United States v. Yellow Cab Co.,* 338 U.S. 338, 342 (1948). The "clearly erroneous" rule applies even when the district court's findings are based "on physical or documentary evidence or inferences from other facts." *Bessemer City, supra,* at 574. Deference is due the District Court, as the original finder of fact, because "[t]he trial judge's major role is the determination of fact, and with

experience in fulfilling that role comes its expertise." Ibid.

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; "For only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Bessemer City* at 575. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Ibid.

In the case at bar the District Court credited the testimony of respondent's expert witness Mr. Metcalf stating:

> The Court basically accepts the testimony of Mr. Metcalf and finds that there is only approximately 12 acres in Whittier where an adult business might locate consistent with the ordinance. The effect of the ordinance is to substantially restrict Walnut's opportunity to operate an adult theater in the city. If, for example, an adult bookstore or massage parlor were to open within the 12 acres, Walnut would be precluded from operating, because of the prohibition against the concentration of adult businesses. In short, the ordinance denies Walnut a reasonable opportunity to exhibit constitutionally protected films.

App. F-14.

As already noted, "[f]or the purposes of argument" the Ninth Circuit used "the evidence most favorable to

the city," because it found that the difference of opinion between the experts had "no impact on the result" it reached. App. A-13. The Ninth Circuit noted that the ordinance had a double whammy: it imposed a 1000 foot separation requirement between any two adult businesses, thereby preventing such businesses from clustering within a given area, and at the same time severely limited the location where an adult business might operate. Under the ordinance there was at most "just three areas in which adult businesses may locate." App. A-15.[4]

In light of the double restriction, the Ninth Circuit found it "quite obvious that together the areas would allow only a small handful of adult businesses to operate within the city . . . in light of the required 72-acre buffer zone imposed by the ordinance." App. A-15.[5]

The Court concluded that enforcement of the ordinance as to respondent's theater would force the only existing adult theater in the city to close at its present location with no reasonable prospect of a place to relocate. App. A-19. Accordingly, the Ninth Circuit affirmed the District Court's conclusion that the petitioner's ordinance is unconstitutional because it not only effectively denies respondent a reasonable opportunity to open and operate an adult theater within the City, "but it also

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[4] The Ninth Circuit noted that one of the three areas might not be available but for the purposes of its analysis it assumed it was available. App. A-15, n.6.

[5] In reaching this conclusion the Ninth Circuit did not engage in any inquiry whatsoever as to whether the allegedly available sites were "presently available for sale or lease," or likely to be available in the future. App. A-16.

would force the closure of all adult businesses existing at the time the ordinance was passed." App. A-19.

It is plain that both the District Court and the Ninth Circuit studiously applied the Court's teaching in Renton. In the end petitioner wants this Court to overstep the bounds of its duty under Rule 52(a) and re-weigh the evidence.

II.

PETITIONER'S CONTENTION THAT RESPONDENT IS NOT ENTITLED TO THE FEES AWARDED WITH INTEREST IS FRIVOLOUS.

A. On May 21, 1984, the District Court awarded respondent fees in the sum of $39,035.00 for services rendered in the District Court for succeeding in invalidating petitioner's ordinance. App. B-2. The Ninth Circuit affirmed this fee award on September 30, 1985. App. L-9-12. The Court found that respondent's hourly rate was reasonable "for a case which wound its way through five different courts and for an attorney who has orally argued 10 cases before the United States Supreme Court, who has practiced for 35 years, and who has been awarded $200 per hour in another matter." App. L-9-10. Addressing petitioner's contention that respondent spent hours on "unsuccessful claims" the Court stated:

> In this case, as the District Court observed, plaintiff received all the relief it asked for. Here, too, the City failed to introduce any evidence that the time spent was unreasonable. Walnut will be compensated for all hours reasonably spent as found by the District Court.

App. L-10. Addressing petitioner's contention that respondent did not have adequate documentation, the Ninth Circuit stated that the District Court did not abuse its discretion in determining that the documentation was adequate. App. L-11.

Petitioner argues that respondent should be denied the fee award for successfully trying the case in District Court because the Findings and Conclusions entered March 9, 1984, were vacated when the Ninth Circuit remanded the case to the District Court for reconsideration in light of *Renton*. On remand, relying on the trial record, the District Court again found the ordinance unconstitutional. Petitioner's contention that respondent should be denied fees for services rendered in winning the case on trial is plainly frivolous.

B. On January 21, 1986, the District Court awarded respondent the sum of $25,478.00 for services rendered in the Ninth Circuit in connection with the appeal which culminated in the amended memorandum of September 30, 1985. App. L. Respondent was clearly the prevailing party in that case.

Petitioner contends that the fees for this appeal should be denied because this Court vacated the Ninth Circuit's judgment, and remanded for reconsideration in light of *Renton*. *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1132 (1986).

Petitioner acknowledges that respondent "was successful after remand in persuading the District Court and the Ninth Circuit of the merits of its claim." Petition for Cert. at 19. The vacated judgment was plainly a necessary

stepping stone to respondent's ultimate success. Accordingly, fees are appropriate for work done on the appeal.

C. The District Court awarded interest on the fees from the date the original award was made. This was necessary to make the fee reasonable. On May 21, 1984, the District Court awarded respondent $39,035 for work performed in the District Court from May 7, 1981, when the complaint was filed, to May 21, 1984. After the case had travelled up and down the judicial ladder, the Court reinstated the fee award of $39,035. Interest on that sum was compelled to make the award reasonable. The same is true with regard to the fee award made January 21, 1986, for $25,478. Without the interest the award would have been unreasonably low.

CONCLUSION

For the aforesaid reasons, the petition for writ of certiorari should be denied.

Dated: March 14, 1989

Respectfully submitted,

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